DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-834
Title: Kevin Kasten, Petitioner
v.
Saint-Gobain Performance Plastics Corporation
Docketed: January 14, 2010
Linked with 10A260
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (08-2820)
Decision Date: June 29, 2009
Rehearing Denied: October 15, 2009

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 12 2010	Petition for a writ of certiorari filed. (Response due February 16, 2010)
Feb 12 2010	Brief of respondent Saint-Gobain Performance Plastics Corporation in opposition filed.
Feb 23 2010	Reply of petitioner Kevin Kasten filed.
Feb 24 2010	DISTRIBUTED for Conference of March 19, 2010.
Mar 22 2010	Petition GRANTED.
Apr 21 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 17, 2010.
Apr 21 2010	The time within which to file respondent's brief on the merits is extended to and including August 16, 2010.
May 26 2010	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the petitioner.
Jun 8 2010	Consent to the filing of amicus curiae briefs, in supportof either party or of neither party, received from counsel for the respondent
Jun 16 2010	Brief of petitioner Kevin Kasten filed.
Jun 16 2010	Joint appendix filed. (Statement of costs filed)
Jun 23 2010	Brief amicus curiae of the United States filed.
Jun 23 2010	Brief amici curiae of National Employment Law Project, et al. filed.
Jun 23 2010	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Jun 23 2010	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Jul 20 2010	SET FOR ARGUMENT ON Wednesday, October 13, 2010.
Jul 22 2010	Record from U.S.C.A. for 7th Circuit is electronic.

Jul 29 2010	CIRCULATED.
Aug 16 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 16 2010	Brief of respondent Saint-Gobain Performance Plastics Corporation filed. (Distributed)
Aug 23 2010	Brief amici curiae of Equal Employment Advisory Council, et al. filed. (Distributed)
Sep 7 2010	Justice Kagan is recused in this case.
Sep 8 2010	Application (10A260) to extend the time to file a reply brief from September 15, 2010 to September 22, 2010, submitted to Justice Breyer.
Sep 9 2010	Application (10A260) denied by Justice Breyer.
Sep 14 2010	Reply of petitioner Kevin Kasten filed. (Distributed)
Sep 28 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 13 2010	Argued. For petitioner: James H. Kaster, Minneapolis, Minn.; and Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Carter G. Phillips, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-834 JAN 12 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?

PARTIES TO THE PROCEEDING

All parties to this Action are set forth in the Caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner / Plaintiff Kevin Kasten respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit denying the petition for rehearing and rehearing *en banc*, with three judges dissenting, is available at *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310 (7th Cir. 2009), and is reproduced at Petitioner's Appendix ("App.") at 1. The panel opinion of the United States Court of Appeals for the Seventh Circuit is available at *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009) and is reproduced at App. 32. The district court's opinion granting summary judgment is available at *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp. 2d 608 (W.D. Wis. 2008) and is reproduced at App. 63.

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals issued its Opinion and Final Judgment on June 29, 2009. The Seventh Circuit denied Petitioner's timely-filed petition for rehearing and rehearing *en banc* on October 15, 2009.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

CONCISE STATEMENT OF THE CASE

On June 29, 2009, the Seventh Circuit Court of Appeals affirmed the dismissal of Petitioner's retaliation claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), holding that his "unwritten, purely verbal complaints are not protected activity" because "the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing". App. 43. In light of the discrepancy between the Seventh Circuit's holding and other Circuits, the Department of

Labor and Equal Employment Opportunity Commission's warnings that the decision will have a negative impact on enforcement of the FLSA, Equal Pay Act, and other Federal laws, and the Seventh Circuit dissenting opinion recognizing that the decision is "contrary to the understanding of Congress," this petition for a writ of certiorari follows. App. 2.

I. Factual Background

Petitioner Kevin Kasten worked at Respondent Saint-Gobain Performance Plastics Corporation's Portage, Wisconsin facility from October 2003 until December 2006 as an hourly-paid manufacturing and production worker. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 948 (W.D. Wis. 2008), App. 81.

Petitioner alleges that in late 2006, he began issuing repeated oral complaints to his supervisors, in compliance with company reporting procedures, about the legal implications of employees not clocking in during the gowning process, and therefore not being paid for their donning and doffing time. App. 24 n.4, 34. Specifically, Petitioner states that he: (1) told his Shift Supervisor that the location of Respondent's time clocks was illegal; (2) met with the Human Resources Generalist and informed her that the location of Respondent's time clocks was illegal, and that if Respondent was challenged in court regarding its time clock practices, "they would lose"; (3) informed his

Lead Operator that the location of Respondent's time clocks was illegal on three or four occasions; (4) told his Lead Operator that he was considering starting a lawsuit regarding the location of the time clocks; and (5) told the Human Resources Manager and the Director that he believed the location of the time clocks was illegal and that if Respondent was challenged in court, it would lose. App. 34-35. Respondent denies receiving these complaints. App. 34.

During the same timeframe, Petitioner received an increasing number of disciplinary warnings, a suspension, and ultimately was terminated. App. 33-35. Petitioner claims that this discipline and termination was in retaliation for his complaints of violations of the FLSA, and Respondent denies retaliation.[1] App. 35.

On August 8, 2007, Petitioner filed a Complaint in the United States District Court for the Western District of Wisconsin on behalf of himself and a collective and Rule 23 class, alleging, *inter alia*, that Respondent violated the minimum wage and overtime requirements of the FLSA, 29 U.S.C. §§ 206-207 and Wisconsin labor law by failing to pay its employees for work time spent donning and doffing. App. 73, 85. On June 2, 2008, the District Court entered partial summary judgment in the plaintiffs' favor, granted class certification, and held that Respondent was liable to the class as a matter of law for failing to compensate employees for all hours worked. App. 112.

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[1] The district court impermissibly adopted disputed facts and drew inferences against Petitioner regarding the reason for his disciplinary action, but the ultimate decision turned on whether oral complaints to the employer are protected, rather than the disputed matters.

II. Proceedings Below

A. Summary Judgment in the District Court

On December 3, 2007, Petitioner filed the instant case, alleging that Respondent retaliated against him in violation of the FLSA by terminating his employment because he filed oral complaints and indicated that he planned to take legal action for Respondent's violations of the FLSA. *See* App. 63. The District Court for the Western District of Wisconsin exercised jurisdiction pursuant to 28 U.S.C. § 1331. *Id.* Respondent moved for summary judgment, and on June 19, 2008, the District Court granted Respondent's motion on the basis of its' determination that, as a matter of law, oral complaints cannot be "filed" as the statute requires, and thus can never constitute protected conduct within the anti-retaliation provision of the FLSA. App. 71-72.

B. Decision on Appeal

On June 29, 2009, a three-judge panel at the Seventh Circuit Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1). App. 32. The panel refused to give deference to Amicus Curiae Department of Labor's position, and affirmed the judgment of the District Court. App. 39 n.2. The panel held that informal intra-company complaints are protected, but that unwritten oral complaints are not "filed," and therefore can never come within the protection of the FLSA anti-retaliation provision. App. 38, 43. The court acknowledged its disagreement with other Circuits, which find that oral complaints to an employer are protected activity under the FLSA. App. 41. Nevertheless, the panel confirmed the district court's holding that "[o]ne cannot 'file' an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place." App. 39.

C. Denial of Rehearing with Three Dissenting Judges

Petitioner thereafter sought rehearing, and the Secretary of Labor and Equal Employment Opportunity Commission ("EEOC") joined Petitioner's position as Amici Curiae. *See* App. 17. On October 15, 2009, the Seventh Circuit denied the petition, but three Judges issued a lengthy dissenting opinion. App. 1-2. The dissent stated:

> In deeming the statutory language to reach only written and not oral complaints, the court has taken a position contrary to the longstanding view of the

> Department of Labor, departed from the holdings of other circuits, and interpreted the statutory language in a way that I believe is contrary to the understanding of Congress.

App. 2. The dissent recognized a long list of statutes which include similar language, and have been held to encompass protection for oral complaints. App. 2-3. It contrasted these statutes with another lengthy list of statutes in which Congress "specifically require[s] written complaints." App. 7. Since the Seventh Circuit's decision has such a broad impact on a variety of anti-retaliation provisions, which "serve to protect not just the individual worker, but the means by which Federal agencies become aware of unlawful labor practices", the dissent determined that further consideration was warranted. App. 3.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The Seventh Circuit adopted an unprecedented interpretation of the anti-retaliation provision of the Fair Labor Standards Act, holding that that provision does not protect a worker who complains orally - in person or by telephone - about a violation of the Act.[2] Because the Equal Pay Act is enforced under the provisions of the FLSA, a female employee who complains to her supervisor about a violation of the Equal Pay Act is also unprotected in the Seventh Circuit. Moreover, the panel's decision "would apply to an employee's external contacts with regulatory officials." App. 9-10. Accordingly, employees could legally be fired for telephoning the Department of Labor or EEOC, or for speaking in person with officials of those agencies, about violations of the FLSA or the Equal Pay Act.

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[2] The only other published decision in agreement with the Seventh Circuit in this case is at the district court level. *See, e.g., Clevinger v. Motel Sleepers, Inc.,* 36 F. Supp. 2d

Certiorari is warranted. The decision of the court of appeals poses a serious obstacle to the administration of the law in the Seventh Circuit. The Seventh Circuit's decision to legalize retaliation against employees who attempt to secure their rights under the FLSA verbally conflicts with the decisions of all other Federal Courts of Appeals to have considered the issue, and conflicts with the instructions of this Court on an important issue of Federal law. The scope of protection against retaliation is an issue of exceptional importance in the administration of the FLSA as well as other Federal statutes, on which national uniformity is vital. Petitioner therefore respectfully petitions for this Court to review the judgment of the Seventh Circuit Court of Appeals.

322, 324 (W.D. Va. 1999) ("The word 'filed' clearly denotes a procedure other than oral.").

I. THE APPELLATE DECISION CONFLICTS WITH THE DECISIONS OF SIX OTHER COURTS OF APPEALS.

In conflict with the six other Courts of Appeals that have considered the issue,[3] the Seventh Circuit, in a straightforward but sweeping holding, ruled that "the phrase 'file any complaint' [in section 215(a)(3) of the FLSA] requires a plaintiff employee to submit some sort of writing." App. 43. On this interpretation, section 215(a)(3) does not apply to oral complaints in the Seventh Circuit, either in person (as occurred in this case) or by telephone, regardless of the venue in which they are raised.

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[3] The section 215(a)(3) conflict most frequently discussed relates to whether complaints must be "formally" filed with a court or administrative agency. Eight circuits hold that internal complaints to an employer are protected. *See, e.g., Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617 (5th Cir. 2008); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1116 (2000); *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975). Two circuits hold that complaints must be filed in courts or administrative agencies. *Whitten v. City of Easley*, 62 Fed. Appx. 477 (4th Cir. 2003) (unpublished); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000); *Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993) *cert. denied*, 511 U.S. 1052 (1994). Because the Seventh Circuit correctly determined that complaints to an employer are protected, the only conflict at issue is whether oral complaints are protected activity, regardless of the venue in which they are raised.

The Seventh Circuit's divergence from other Circuits on this issue is well-established. The Seventh Circuit candidly recognized that "other [Courts of Appeals] have found oral complaints to be protected activity," correctly citing such interpretations of section 215(a)(3) by the Sixth, Eighth and Eleventh Circuits. App. 41. In their dissent from the denial of rehearing en banc, several members of the Court of Appeals also noted that the panel had "rejected the multiple decisions from other circuits recognizing that oral as well as written complaints are protected by the statute." App. 5. Likewise, the district court noted that the narrow interpretation of section 215(a)(3) proposed by the Defendant, and ultimately adopted by the Seventh Circuit, conflicted with decisions in several circuits. App. 68. In their amicus brief supporting rehearing en banc, the Secretary of Labor and EEOC repeatedly pointed out that the panel decision "conflicts with conclusions of the Sixth, Eighth, and Eleventh Circuits that internal complaints are protected, even when communicated orally." App. 18.

The court below acknowledged that the Sixth Circuit holds that oral complaints are protected by section 215(a)(3). App. 41. In *EEOC v. Romeo Community Schools*, an Equal Pay Act retaliation case governed by section 215(a)(3), the employee suffered retaliation after she orally "complained about her pay rate . . . but was told that her pay would not be raised." 976 F. 2d at 986. The employee "told [school officials] she believed they were 'breaking some sort of law' by paying her lower wages than . . . paid to male [workers]." *Id.* at 989. The Sixth Circuit held that "it is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint." *Id.* In *Moore v. Freeman*, 355 F. 3d 558 (6th Cir. 2004), the Sixth Circuit upheld a retaliation claim based on an oral complaint under the FLSA and Equal Pay Act. The plaintiff in that case had "raised the [salary] issue [with his supervisor] at a . . . staff meeting." *Id.* at 561. The Sixth Circuit held:

> [The plaintiff] was clearly engaged in statutorily-protected activity, given the fact that the anti-retaliation provisions of the FLSA can be triggered by informal complaints . . . and that the defendants do not dispute that [the plaintiff] protested to [his supervisor] about his unequal pay.

355 F. 3d at 562. In *Moon v. Transport Drivers, Inc.*, the Sixth Circuit again upheld a retaliation claim involving an oral complaint, applying the anti-retaliation provision[4] of the Surface Transportation Assistance Act ("STAA"), which has language identical to section 215(a)(3). 836

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[4] The STAA forbids retaliation "because such employee . . . has filed any complaint . . . relating to a violation of [certain provisions]." 49 U.S.C. § 2305(a).

F. 2d 226, 228 (6th Cir. 1987) (plaintiff "made a number of oral complaints to . . . his supervisor . . . , thereby engaging in protected activity under the STAA.").

The Eighth Circuit also holds that internal oral complaints about FLSA violations are protected by section 215(a)(3). In *Brennan v. Maxey's Yamaha, Inc.*, 513 F. 2d 179, the dismissed employee had on two occasions voiced her objection to actions[5] that the employer was taking in violation of the FLSA.[6] The Eighth Circuit stated:

> [The employee's] protest of what she believed to be unlawful conduct on [the employer's] part was an act protected from reprisals. . . . Her discharge was a direct result of her insistence upon receiving [her rights] under the Act. . . . [H]er lawful assertion of rights based on that belief [that the employer was violating the FLSA] must be protected.

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[5] Following an agreement with the Department of Labor to pay back wages to several employees, the company president insisted that several of those workers endorse their back wage checks to the company. *Maxey's Yamaha*, 513 F. 2d at 180.

[6] The employee explained, "I told him that it was illegal, that it was wrong, and that if they happen to be caught that they would be in serious trouble, but [the company president] said to me that if I didn't say anything, no one would find out" and "I told him again that I didn't approve of the tactics he was using"). *Id.* at 182.

Id. at 181.

The Eleventh Circuit, as the panel recognized, has also held that oral complaints are protected by section 215(a)(3). App. 41. In *EEOC v. White and Son Enterprises,* 881 F. 2d 1006, several female employees twice complained verbally that they were being paid less than men doing the same work.[7] The employer argued that the actions of the women did not constitute "fil[ing] a complaint" and thus were not among "the acts specified in the FLSA." *Id.* at 1011. The Eleventh Circuit rejected that narrow interpretation of section 215(a)(3), holding that the oral complaints to management were indeed protected:

> [E]ven though the [dismissed workers] had not yet filed formal charges of discrimination [under the Equal Pay Act] with the EEOC, the discharge by appellant can still be retaliatory in nature. . . . [W]e

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[7] The court described the following:

> When the [terminated female employees] learned of the pay increase [for male co-workers], several of them met with [a co-owner of the firm] to ask why they did not receive as raise as did the men and to request equal pay. . . . The next morning, when [the other owner] arrived, the women were waiting to speak to him. [The other owner] asked the women if there was a problem, and they replied that there was. [The other owner] then stated that if it was about a raise, there would be none . . .

Id. at 1007-08, 1011.

> conclude that the unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the statute. . . . The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance.

Id. at 1011.

The Fifth Circuit also holds that oral statements can constitute protected activity. *Hagan,* 529 F. 3d 617. In *Hagan v. Echostar Satellite, L.L.C.,* the plaintiff was dismissed because of statements he made in two meetings - one with his supervisors and another with his subordinates - regarding a company decision that reduced certain overtime pay.[8] *Id.* The Fifth Circuit held that a worker's oral statements to superiors or subordinates could constitute protected activity. *Id.* at 626.

The interpretation of section 215(a)(3) in the Ninth Circuit also expressly includes oral complaints to supervisors.

> [S]o long as an employee communicates the *substance* of his allegations to the

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[8] The first statement was at a "December . . . 2004 . . . managers' meeting." *Id.* at 620. The second statement occurred when the plaintiff met with several subordinates "[l]ater that day." *Id.* at 620-21.

> employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by § 215(a)(3). As several circuits have held, moreover, the employee may communicate such allegations *orally* or in writing.

Ackerley, 180 F. 3d at 1007-08.

Finally, the Tenth Circuit held that an oral request for overtime pay was a protected activity under section 215(a)(3) in *Pacheco v. Whiting Farms, Inc.*, 365 F. 3d 1199 (10th Cir. 2004). The plaintiff asked the company vice-president in-person for overtime pay.[9] The Tenth Circuit held that section 215(a)(3) applied to that request:

> [W]e have held an employee's unofficial assertion of rights under § 215(a)(3) is . . . protected activity. . . . An employee's request for overtime wages is protected activity in the form of an unofficial assertion of FLSA rights. . . . In this case, Plaintiff engaged in protected activity when she requested overtime wages.

365 F. 3d at 1206-07. *See also Love*, 738 F. 2d at 387 ("[w]hen the 'immediate cause or motivating factor of a discharge is the employee's assertion of

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[9] "Plaintiff asked [the vice-president] if the 'packaging department could get overtime like shipping.' [The vice-president] appeared 'nervous and shocked' upon Plaintiff's inquiry, but informed Plaintiff he would look into the matter." *Pacheco*, 365 F. 3d at 1202.

statutory rights, the discharge is discriminatory under § 215(a)(3)'. . . The Act also applies to the unofficial assertion of rights through complaints at work.") (*quoting Maxey's Yamaha*, 513 F.2d at 181).

In sum, the Seventh Circuit's decision creates a clear disagreement among the circuits which requires resolution. The practical effect of this split is that in an organization such as Respondent's, which operates across the country, employees in the Seventh Circuit will receive protection only if they file written complaints, while employees in the Sixth, Eighth, Eleventh, Fifth, Ninth, and Tenth Circuits will receive protection for issuing oral complaints. For employees who travel, report complaints to a national headquarters office, or use complaint hotlines, the confusion among the Circuits is unworkable. This kind of national legal confusion necessitates review and clarification by the Court.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

In the Court of Appeals, the Secretary of Labor warned that "a decision . . . that internal complaints that are oral are not covered . . . would have an adverse impact upon the administration of the Department of Labor's programs", and characterized the Seventh Circuit's decision as presenting a question of "exceptional importance." App. 18, 46. The question presented here affects not only the implementation of the FLSA anti-retaliation provision, but will also have an enormous impact on the enforceability of the FLSA as a whole, as well as the Courts of Appeals' interpretations of a variety of other retaliation provisions in similar Federal statutes. The answer to this important question will therefore impact millions of working Americans.

To ensure an adequate flow of information to the Department of Labor in an effort to enable enforcement of the FLSA, Congress chose to rely on employee reports of violations. Particularly in off-the-clock cases like Petitioner's, employee reports are the *sole* source of information regarding FLSA violations. As this Court explained in *Mitchell v. Robert DeMario Jewelry, Inc.*:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed Federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce

> aggrieved employees quietly to accept substandard conditions.

361 U.S. 288, 292 (1960) (citations omitted). *See also* Hearings on the Fair Labor Standards Amendments of 1977, S. Comm. on Human Resources, Subcomm. on Labor, 95th Cong., 1st Sess. 17 (1977), App. 123; H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess., at 10, 26 (1938), App. 115.

However, the Seventh Circuit decision largely eviscerates the statute's protection for workers who bring violations of the FLSA or the Equal Pay Act to their employers' attention. The Secretary of Labor pointed out that "in the workplace an employee is more likely to approach an employer with an oral complaint about wage and hour practices, rather than providing a written document."[10] App. 59. However, employees who wish to resolve an issue informally with their employers will think twice before doing so if they are aware of the potential consequences in the Seventh Circuit.[11]

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[10] *See e.g., Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *Knickerbocker v. City of Stockton*, 81 F.3d 907 (9th Cir. 1996); *Genesee Hosp.*, 10 F.3d at 55; *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 778 (N.D. Ill. 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 690 (E.D. Wis. 2007); *Clevinger*, 36 F. Supp. 2d 322.

[11] Many workers in the Seventh Circuit will not be able to avoid the consequences of the Seventh Circuit's decision by

As the Department of Labor explained, "a decision . . . that internal complaints that are oral are not covered, would have an adverse impact upon the effective administration of the Department of Labor's programs", including a number of other legal schemes in addition to the FLSA. App. 46. For example, anti-retaliation provisions that use similar language to prohibit reprisals against a worker who "filed a complaint," include the Occupational Safety and Health Act,[12] the Railway Labor Act,[13] the Surface Transportation Assistance Act,[14] the Migrant and Seasonal Agricultural Worker Protection Act,[15] and the Employee Polygraph

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circumspectly putting their complaints in writing and never mentioning them out loud. Most employees are laymen with no knowledge of Seventh Circuit case law and no access to skilled counsel who might advise them to raise such matters only in documents.

[12] 29 U.S.C. § 660(c)(1) (proscribing retaliation against "any employee because such employee has filed any complaint . . . under or related to this chapter . . .").

[13] 49 U.S.C. § 20109(a)(3) (proscribing retaliation against railroad workers who "file a complaint" about certain safety issues).

[14] 49 U.S.C. § 31105(a)(1)(A)(i) (proscribing retaliation against employee because he "has filed a complaint" related to certain motor vehicle safety issues).

[15] 29 U.S.C. § 1855(a) (proscribing retaliation against worker who "has, with just cause, filed any complaint . . . under or related to this chapter").

Protection Act.[16] Oral complaints under those statutes and others[17] may no longer receive protection against retaliation in the Seventh Circuit.

The Secretary of Labor has further objected that "[p]rotecting only written complaints under Section 15(a)(3) . . . would mean, for example, that an employee who places a telephone call to the Department of Labor would not be protected." Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part at 14, *Kilpatrick v. Service Merchandise, Inc.*, No. 98-31423 (6th Cir. Apr. 22, 1999), *available at* 1999 WL 33729234. This is extremely problematic, because both the EEOC and the Wage and Hour Division indicate on their websites that aggrieved employees should call a toll-free number to make complaints.[18] Even the

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[16] 29 U.S.C. § 2002(4)(A) (proscribing retaliation against an employee because the employee "has filed any complaint").

[17] *See* 5 U.S.C. § 7116(a)(4) (proscribing retaliation against certain Federal employees because "the employee has filed a complaint" related to labor management relations); 22 U.S.C. § 4115(a)(4) (proscribing discrimination against a State Department employee "because the employee has filed a complaint" related to labor management relations); Workforce Investment Act, 29 U.S.C. § 2934(f) (requiring Secretary to take remedial action if a grant recipient has discriminated against an individual because such individual "has filed any complaint").

[18] The Wage and Hour Division call center phone number is displayed at www.dol.gov/whd/contact_us.htm. The EEOC

FLSA poster required to be displayed in millions of worksites across the nation contains that same number.[19] The uniquely narrow interpretation of section 215(a)(3) issued by the Seventh Circuit means that callers from Illinois, Indiana and Wisconsin, unlike callers from elsewhere in the United States, may lawfully be subject to retaliation for speaking with the Division or Commission. It would be wholly impracticable for the national call centers for these two agencies to provide different information, counsel and warnings depending on the place of employment of each particular caller.

The Seventh Circuit's opinion will no doubt have a tremendous chilling effect on employee reporting, encourage prompt retaliatory action if employers hear of the possibility of an employee questioning the propriety of wage payments, and nearly obliterate the viability of enforcement mechanisms written into not only the FLSA, but other Federal laws employing similar language. Because the question presented involves an extremely important issue of Federal law, certiorari should be granted.

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call center phone number is displayed at www.eeoc.gov/contact/index.cfm.

[19] The toll-free number for the Wage and Hour Division is 1-866-4-USWAGE.

III. THE COURT OF APPEALS' DECISION IS INCORRECT, AND RUNS CONTRARY TO THIS COURT'S PRIOR GUIDANCE ON INTERPRETING THE FLSA.

Moreover, the Seventh Circuit's decision is incorrect. The decision rests on a single mistaken premise: that the verb "file" used in the phrase "filed any complaint" necessarily requires a written document. App. 43. The court below based its narrow interpretation of section 215(a)(3) on one definition of the word "file" found in a single dictionary, and rejected the government's argument that "file" could also mean "submit," on the grounds that the alternative meaning "seems to us overbroad."[20] App. 39.

The Seventh Circuit's decision conflicts with this Court's instructions in *Tennessee Coal,*

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[20] As Justice Scalia explained in his concurring opinion in *Green v. Bock Laundry*, 490 U.S. 504, 529 (1989), when choosing among alternative available definitions of a legal term, it is most appropriate to choose the definition which does the "least violence to the text" and is most "consistent with the policy of law in general and the [Act at issue] in particular." Here, the Seventh Circuit did not explain why it rejected the definition of "to file" as "to submit", which was the option which does the least violence to the FLSA, is the most consistent with the policy of the law in general, and the FLSA's remedial purposes specifically.

Iron and Railroad Co. v. Muscoda Local 123, 321 U.S. 590 (1944), which called for an expansive and practical interpretation of the FLSA.[21] In *Tennessee Coal*, the Court set forth guidelines for statutory interpretation of the FLSA. *Id.* at 592. The Court reasoned that the meaning of the word "work" in the FLSA could "be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Id.* The Court instructed that the provisions of the FLSA "are remedial and humanitarian in purpose. . . . Such a statute must not be interpreted or applied in a narrow, grudging manner." 321 U.S. at 597. However, the Seventh Circuit failed to confer any weight to the Congressional remedial and humanitarian purpose of the FLSA, and ignored the Court's instructions to resolves questions of statutory construction under the FLSA "by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings". *Id.* at 592.

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[21] The Seventh Circuit's holding is also contrary in spirit to this Court's recent decisions in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), and *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), which indicate that anti-retaliation provisions should be interpreted in a manner which best-effectuates the broad remedial goals of the statutes in which they appear.

Had the Seventh Circuit applied these principles in an effort to find an option that would effectuate the Congressional purpose of section 215(a)(3), it would have discovered that "file" is defined as "to submit" in other dictionaries. *American Heritage Dictionary*, at 658, (4th ed. 2000), App. 114 (defining "files" as "3. To send or submit (copy) to a newspaper. 4. To carry out the first stage of . . ."); App. 58-59 (citing *New Shorter Oxford English Dictionary*, 947 (1993) (defining "file" as "[to] submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority"); *Random House College Dictionary*, 493 (1982) (defining "file" as "[t]o submit (an application, petition, etc.)"; *American Heritage Desk Dictionary*, 369 (1981) (defining "file" as "to present for consideration"). A number of lower courts have also held in other contexts that "file" can encompass an oral statement.[22]

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[22] For example, the Oregon Supreme Court explained:

> [The defendant] suggests that the term "filed" strongly implies a writing. But while that may be true with respect to *court* filings, we are not persuaded that the term carries that some connotation in the world of insurance and beyond. Certainly car and unemployment insurance claims often are "filed" orally by telephone, as are newspaper stories and ordinary complaints to businesses and government agencies.

Parks v. Farmers Ins. Co. of Or., ---P.3d--- 2009 WL 4981699, at *9 (Or. Dec. 24, 2009); *See also Mid-Century Ins. Co. v. Barclay*, 880 S.W. 2d 807, 810 (Tex. App. 1994) (term "filed" refers to "action in providing . . . whatever

The phrase "file a complaint", like the phrases "submit a complaint" and "make a complaint," has an idiomatic meaning: to make a complaint known to the responsible party. If the verb "file" were really limited to documents, then the phrase "file an oral complaint" would be nonsense. As the dissenting judges noted in this case, however, several Federal regulations and a large number of Federal judicial and administrative decisions which refer to the "filing" of an "oral complaint" or "oral grievance."[23] App. 6. At the state level there are

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notice was required"). *See also* App. 58 (quoting *Marshall v. Power City Elec., Inc.*, No. 77-197, 1979 WL 23049, at *1-2 (E.D. Wash. Oct. 23, 1979) ("The statute [§ 215(a)(3) nowhere explicitly requires a written complaint to confer protection . . . . The Court further holds that the term 'filed' as used in this clause means 'lodged' and is not limited to a written form of complaint.").

[23] *See e.g., Don Bassette Aviation, Inc.*, DMS FAA-2005-20640, DMS FAA 2005-20641, 2006 WL 728858 (Dep't Of Transp. Mar. 17, 2006) ("filed oral Motions to dismiss"); *East E. Ky. Paving Corp.*, 293 NLRB 1132, 1133 (1989) ("filed an oral grievance"); I.R.S. Priv. Ltr. Rul., PLR 8630019, 1986 WL 369778 (Apr. 23, 1986) ("the nurses regularly file oral . . . reports"); *Guy Am. Airways, Inc.*, 4 N.T.S.B. 886, 877 n.3 (May 20, 1983) ("notice of appeal was filed orally"); *Motor Convoy, Inc.*, 252 NLRB 1253, 1257 (1980) (the employee "filed . . . many oral complaints") (reversed on other grounds); *Ormet Corp.*, OSHRC Dkt. No. 76-4397, 1978 WL 6690 (Occupational Safety Health Review Comm'n May 18, 1978) (two motions " filed orally at the commencement of the trial").

also statutes, regulations,[24] and a substantial number of judicial decisions reaching back almost a century[25] which use "file" to refer to oral complaints, grievances or other statements. Public and private organizations (including the Defendant in this case) provide employees and members of the public with a toll-free number and invite them to "file a complaint."[26]

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[24] Minn. Stat. § 144.4808(2) ("may be filed orally by telephone"); Tenn. Code § 49-6-3401(c)(4)(B) ("appeals must be filed, orally or in writing"); Miss. Code § 69-47-23(4) ("may file a written or oral complaint"); Nev. Rev. Stat. § 618.705 (imposing penalties on "[a]ny person who . . . files a false oral or written complaint"); N.J. Stat. § 30:4C-12 (in certain circumstances "a written or oral complaint may be filed"); 2007 ME Reg. Text 46674 (NS) § 2(A) ("Complaints may be filed orally").

[25] *Donovan v. Walsh*, No. 287326, 2005 WL 1208964 at *2 (Mass. Land Ct. May 23, 2005) ("filed orally a motion"); *State v. Howard*, 805 So. 2d 1247, 1256 (La. Ct. App. 2002) ("motion for continuance filed orally"); *Grievance of McCort*, 650 A.2d 504, 506 n.1 (Vt. 1994) ("complaint . . . may be filed orally"); *State v. Riggins*, 508 So. 2d 918, 919 (La. Ct. App. 1987) ("The State filed an oral multiple bill of information"); *In re Estate of Shields v. Abdalian*, No. 44137, 1982 WL 5386, at *1 (Ohio Ct. App. May 27, 1982) ("claim . . . was filed orally with counsel"); *Commonwealth v. Molina*, 346 A.2d 351, n. 4 (Pa. Super. Ct. 1976) ("a writ of coram nobis could be filed orally"); *Richmond v. Newson*, 17 So. 2d 635, 636 (La. Ct. App. 1944) ("right to file oral pleadings"); *Ashley v. Tri-State Lumber Co.*, 91 S.E. 813, 814 (W. Va. 1917) ("court permits such demurrer to be filed orally").

[26] For example, the public is invited to file a complaint orally in the instructions offered on the following websites

Moreover, "it is noteworthy that Congress in many other statutes has specifically required written complaints. . . . These statutes suggest that when Congress means to require that complaints take a written form, it sets forth that requirement expressly." [27] App. 8. Because Congress did not use such language in section 215(a)(3), it seems contrary to Congressional intent to read the words "in writing" into the statutory text.

Moreover, the decision not only leaves an employee who makes an oral complaint unprotected, but it gives an employer a perverse

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for the States of Texas, www.dot.state.tx.us, Minnesota, www.oah.state.mn.us, and New York, www.ins.state.ny.us. *See also* n.18-19, *supra*.

[27] *See, e.g.*, 2 U.S.C. § 437g(a)(1) "complaint shall be in writing")(; 5 U.S.C. § 3330a(a)(2)(B) (same); 7 U.S.C. § 193(a) ("complaint in writing"); 7 U.S.C. § 228b-2(a) (same); 7 U.S.C. § 1599(a) (same); 15 U.S.C. § 80b-9(a) ("file with it a statement in writing"); 19 U.S.C. § 2561(a) (Federal agency may not consider a complaint unless the agency is informed "in writing"); 33 U.S.C. § 392 ("a statement of complaint, verified by oath in writing"); 38 U.S.C. § 4322(b) ("complaint shall be in writing . . ."); 42 U.S.C. § 2000b(a) ("complaint in writing"); 42 U.S.C. § 2000c-6(a) (same); 42 U.S.C. § 3610(a)(1)(A)(ii) ("complaints shall be in writing . . ."); 42 U.S.C. § 15512(a)(2)(C) ("complaint filed . . . shall be in writing and notarized, and signed and sworn by the person filing the complaint."); 47 U.S.C. § 554(g) ("A complaint by any such person shall be in writing, and shall be signed and sworn to by that person."); 49 U.S.C. § 46101(a)(1) ("A person may file a complaint in writing . . .").

incentive to fire or otherwise discriminate against an employee before he or she has had an opportunity to engage in activity that is protected. *See also Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915 at * 2 (D. Or. 1997) (absence of protection creates "a perverse incentive to immediately terminate any employee who complains about wage and hour violations *before* the employee can [engage in protected activity]"). In ***Mitchell***, this Court reasoned that the anti-retaliation provision of the FLSA must be interpreted in light of the practical realities weighing against an employee's decision to report her employer's alleged violations:

> Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

361 U.S at 292. Accordingly, any interpretation that discourages an employee from complaining to his employer about minimum wage and overtime violations undermines the FLSA. *Id.*

The Seventh Circuit's decision presents employees with a "Hobson's choice" of: 1) complaining internally about FLSA violations and leaving themselves unprotected from retaliation; 2) becoming their employer's formal antagonist by filing a formal written complaint; or 3) deciding "that matters had best be left as they are." *See id.* at 293. The decision therefore leaves unprotected precisely those employees whom it ought to benefit: those with FLSA-related concerns who do not wish to "rock the boat" with the employer any more than necessary, and who desire amicable resolutions of workplace disputes. Accordingly, the Court should grant the petition for certiorari to ensure consistent and adequate enforcement of Federal law.

CONCLUSION

For the above reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted this 11th day of January, 2010.

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In the
United States Court of Appeals for the Seventh Circuit

No. 08-2820

KEVIN KASTEN,

Plaintiff-Appellant,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin. No. 07-C-0686—Barbara B. Crabb, *Chief Judge*

On Petition for Rehearing En Banc

SUBMITTED JULY 13, 2009—DECIDED OCTOBER 15, 2009

Before EASTERBROOK, *Chief Judge,* and POSNER, FLAW, KANNE, ROVNER, WOOD, EVANS, WILLIAMS, SYKES, and TINDER, *Circuit Judges.*

On consideration of the petition for rehearing with suggestion of rehearing en banc filed by the plaintiff-appellant and the answer of defendant-appellee, Judge Bauer and Judge Flaum, the two circuit judges on the original panel,* voted to deny

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[*] The third judge on the original panel, District Judge Frederick J. Kapala, did not participate in the petition for rehearing or the petition for rehearing en banc.

rehearing and a majority of the judges in active service voted to deny rehearing en banc.

The petition for rehearing en banc is denied.

ROVNER, *Circuit Judge,* with whom WOOD and WILLIAMS, *Circuit Judges,* join, dissenting from the denial of rehearing en banc. The court has adopted a construction of the Fair Labor Standard Act's anti-retaliation provision that is unique among the circuits. On the one hand, the court understands the statute's "filed any complaint" language to cover intra-company complaints about unfair labor practices, but on the other it concludes that oral complaints fall outside the reach of the statute. *Kasten v. Saint-Gobain Performance Plastics* Corp., 570 F.3d 834 (7th Cir. 2009). In deeming the statutory language to reach only written and not oral complaints, the court has taken a position contrary to the longstanding view of the Department of Labor, departed from the holdings of other circuits, and interpreted the statutory language in a way that I believe is contrary to the understanding of Congress.

Section 15(a)(3) of the Fair Labor Standard Act ("FLSA") makes it unlawful for an employer "to discharge or in any manner discriminate against any employee because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding, under or related- to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3) (emphasis mine). As the Equal Employment Opportunity Commission and the Department of Labor point out, a number of other statutes have anti-retaliation provisions containing language that is similar if not identical to this text. *See* 29 U.S.C. § 660(c)(1) (Occupational Safety and Health Act) (proscribing retaliation against "any employee because such employee has filed any complaint... under or related to this chapter..."); 29 U.S.C. § 1855(a) (Migrant and Seasonal Agricultural Worker Protection Act) (proscribing retaliation against worker who "has, with just cause, filed any complaint . . . under or related to this chapter..."); 33 U.S.C. § 1367(a) (Clean Water Act) (proscribing retaliation against employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter"); 42 U.S.C. 6971(a) (Solid Waste Disposal Act) (proscribing retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter..."). The court's understanding of what the FLSA's "filed any complaint" language means portends a similar construction of those other statutes.

These anti-retaliation provisions play a vital role in protecting the workplace rules that Congress has adopted. They serve to protect not just the individual worker, but the means by which federal agencies become aware of unlawful labor practices. As the Supreme Court has observed with respect to section 15(a)(3) of the FLSA:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach

> officials with their grievances. This ends the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary [of Labor] in section 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, 80 S. Ct. 332, 335 (1960) (citation omitted).

The court in this case rightly concluded that "filed any complaint" reaches complaints that an employee makes to his employer. 570 F.3d at 837-38. Nothing in the statute suggests that the complaint must be made externally to an administrative or judicial body in order to qualify for protection. On the contrary, reference to "any complaint" counsels in favor of a broad understanding that encompasses both internal and external complaints. *See, e.g., Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 41 (1st Cir. 1999). As the court noted, this is the understanding adopted by the "vast majority" of the circuits. 570 F.3d at 838; *see Hagan v. Echostar Satellite,* LLC, 529 F.3d 617, 62526 (5th Cir. 2008); *Moore v. Freeman,* 355 F.3d 558, 562-63 (6th Cir. 2004); *Lambert v. Ackerley,* 180 F.3d 997, 1003-07 (9th Cir. 1999) (en banc); *Valerio,* 173 F.3d at 41-44; *Conner v. Schnuck Markets, Inc.,* 121 F.3d 1390, 1394 (10th Cir. 1997); *EEOC v. White & Son Enters.,* 881 F.2d 1006, 1011-12 (11th Cir. 1989);

Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 181-82 (8th Cir. 1975); *contra Whitten v. City of Easley*, 62 Fed. Appx. 477, 480 (4th Cir. 2003) (unpublished); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55-56 (2d Cir. 1993). But the court went on to conclude that the use of the term "filed" suggests that a complaint must be written in order to come within the statute's protection. 570 F.3d at 838-40. "[T]he natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body." *Id. at* 839. For that reason, the court rejected the multiple decisions from other circuits recognizing that oral as well as written complaints are protected by the statute. *See Lambert*, 180 F.3d at 1008; *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989-90 (6th Cir. 1992); *White & Son Enters.*, 881 F.2d at 1011-12; *Marshall v. Parking Co. of Am.-Denver, Inc.*, 670 F.2d 141, 142-43 (10th Cir. 1982); *Maxey's Yamaha*, 513 F.2d at 181-82; *see also Hagan*, 529 F.3d at 626 (assuming that objections voiced orally to management regarding work schedule change that' decreased overtime pay might be protected by FLSA, but concluding that because objections were framed in personal terms rather than in terms of potential illegality were beyond scope of statute); *Brock v. Richardson*, 812 F.2d 121, 123-25 & n.2 (3d Cir. 1987) (employer's decision to discharge plaintiff based on mistaken belief that she had filed complaint, when in fact she had only spoken with agency investigator, was prohibited by FLSA).[1] It also rejected what has been the Department of Labor's view for nearly fifty years. *See Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, at 40,986 (D. Utah 1961) (DOL action on behalf of employee who cooperated with agency's investigation and insisted that employer pay him back wages in lump sum rather than installments).

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[1] A number of district courts in this circuit have taken a similar view. *See Ergo v. Int'l Merchant Servs., Inc.*, 519 F. Supp. 2d 765, 778-79 (N.D. Ill. 2007) (Leinenweber, J.); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F, Supp. 2d 682, 689-90, 692 (E.D. Wis. 2007) (Adelman, J.); *Skelton v. Am. Intercont'l*

Although I agree that the term "to file" often connotes (particularly for lawyers) the submission of a document, it is by no means out of the ordinary to read and hear the term used in conjunction with oral complaints; in that sense, "to file" is used more broadly to signify the making of a report or the lodging of a protest. Thus, the notion that one can "file" an oral complaint or grievance is reflected in any number of federal opinions and regulations. *See, e.g., NLRB v. Sw. Elec. Co-op., Inc.*, 794 F.2d 276, 279 (7th Cir. 1986) (sustaining NLRB's finding that collective bargaining agreement included "the right to file oral grievances"); *United States v. Bent*, 702 F.2d 210, 212 (11th Cir. 1983) ("Before trial appellant orally filed a motion for a jury trial, which the court denied."); *Ward v. Housatonic Area Reg'l Transit Dist.*, 154 F. Supp. 2d 339, 351 (D. Conn. 2001) ("Clearly, any written or oral complaints that Wa[rd] filed with HART were protected speech..."); *Rallis v. Holiday Inns, Inc.*, 622 F. Supp. 63, 65 (N.D. Ill. 1985)

Univ. Online, 382 F. Supp. 2d 1068, 1076 (N.D. Ill. 2005) (Kennelly, J.); *DeGrange v. Richard Wolf Medical Instruments Corp.*, 141 Lab. Cas. (CCH) 11 34,147, 2000 WL 1368043, at *2 *3 (N.D. Ill. Sep. 15, 2000) (Guzman, J.); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 658-60 (N.D. Ill. 1997) (Coar, J.); *Cuevas v. Monroe Street City Club*, 752 F. Supp. 1405, 1412-13 (N.D. Ill. 1990) (Shadur, J.); *see also Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1047-48 (N.D. Ill. 2005) (Moran, J.) (deliberate failure to show up for work that employees knew would be uncompensated was protected).

("Plaintiffs' complaint alleges that their grievances were ignored after they had filed more than 20 oral and written grievances over an eight year period of time."); 42 C.F.R. 438.402(b)(3) (specifying that certain managed care entities and insurance plans must have grievance procedures that permit enrollee to "file a grievance either orally or in writing" and to "file an appeal either orally or in writing"); *cf.* 14 C.F.R. 1.1 (defining "flight plan" to mean information about intended flight path "that is filed orally or in writing with air traffic control"). These examples (and there are many others) put to rest the notion that filing a complaint invariably means filing a *written* complaint.

At the same time, it is noteworthy that Congress in many other statutes has specifically required written complaints. *See, e.g.,* 2 U.S.C. § 437g(a)(1) (Federal Election Campaign Act) ("Any person who believes a violation of this Act...has occurred, may file a complaint... Such complaint shall be in writing..."); 5 U.S.C. § 3330a(a)(1)(A) & (a)(2)(B) (Veterans Employment Opportunities Act) (preference-eligible veteran who believes agency has violated his or her rights may file complaint; "[s]uch complaint shall be in writing..."); 7 U.S.C. § 193(a) (Packers and Stockyards Act) (whenever the Secretary of Agriculture believes a packer or swine contractor is committing violations, "he shall cause a complaint in writing to be served upon the packer or swine contractor, stating his charges in that respect..."); 7 U.S.C. § 228b-2(a) (same—poultry dealers); 7 U.S.C. § 1599(a) (Federal Seed Act) (same—seed and grain handlers); 19 U.S.C. § 2561(a) (Trade Agreements Act) (federal agency may not consider a complaint unless the Trade Representative informs the agency concerned "in writing"); 38 U.S.C. § 4322(a) & (b) (Uniformed Services Employment and Reemployment Act) (person claiming violation of right to employment or reemployment as veteran may file complaint; "[s]uch complaint shall be in writing..."); 42 U.S.C. § 2000b(a) (Civil Rights Act of 1964) (public accommodations) ("Whenever the Attorney General receives a complaint in writing... the Attorney General is authorized to institute for or in the name of the United States a civil action...."); 42 U.S.C. § 2000c-6(a) (same—public education); 42 U.S.C. § 3610(a)(1)(A)(i) & (ii) (Fair Housing Act) (person aggrieved by discriminatory housing practice may file complaint with Secretary of Housing and Urban Development, and Secretary may also file complaint; "[s]uch complaints shall be in writing..."); 42 U.S.C. § 15512(a)(2)(C) (Help America Vote Act) ("Any complaint filed under the procedures shall be in writing and notarized, ..."); 47 U.S.C. § 554(g) (Cable Communications Policy Act) (complaint by employee or applicant for employment who believes he or she was victim of discrimination by cable operator "shall be in writing, and shall be signed and sworn to by that person"); 49 U.S.C. § 46101(a)(1) (Federal Aviation Act) (la] person may file a complaint in writing" for violation of the Act or its implementing rules and regulations). These statutes suggest that when Congress means to require that complaints take a written form, it sets forth that requirement expressly. *See, e.g., Whitfield v. United States,* 543 U.S. 209, 216-17, 125 S. Ct. 687, 692 (2005).

Our own previous opinions in *Sapperstein v. Hager*, 188 F.3d 852 (7th Cir. 1999), and *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219 (7th Cir. 1995), arguably reflect an understanding of the statutory language that reaches oral as well as written complaints: *Sapperstein* equated the "file any complaint" language with reporting a potential violation of the statute, *see* 188 F.3d at 857, an act which may be accomplished orally as well as by writing, and *Avitia* cited an employee's oral statement to a Department of Labor auditor as protected conduct, 49 F.3d at 1223-24.

Conditioning the protection of the statute on the submission of a written complaint may well mean that aggrieved employees will be treated differently based on happenstance. An employee who schedules a meeting with a human resources manager to discuss the denial of overtime pay will not be protected, no matter how detailed and unequivocal the oral complaint may be, while an employee who cannot catch the manager in her office and instead leaves her a handwritten note or sends her an e-mail to communicate the same sort of complaint will be protected. I submit that the focus is more appropriately on whether the complaining employee has communicated the substance of his concerns to the employer rather than on whether the communication was written. *See Lambert,* 180 F.3d at 1008. In this way court can distinguish between statements that are made in furtherance of an employee's statutory rights from those that amount to no more than vague, "abstract grumblings." *Id.* at 1007 (citing *Valerio,* 173 F.3d at 44).

It also bears pointing out that nothing in the court's holding or rationale limits its narrow construction of the statutory language to intra-company complaints. The court's decision that only written complaints are protected presumably would apply to an employee's external contacts with regulatory officials. *See* 570 F.3d at 839. Yet, other courts have understood the statute to reach oral contacts with an agency as well as oral cooperation with agency auditors. *See, e.g., Daniel v. Winn-Dixie Atlanta, Inc.,* 611 F. Supp. 57, 59 (N.D. Ga. 1985) (employee's phone call to Department of Labor's Wage and Hour Division to inquire whether employer could lawfully deny her overtime compensation was protected by section 215(a)(3); otherwise, "an employee who consulted, but did not file a complaint with, W&H and who informed her employer first would not be protected as long as the employer fired her before she actually could file a complaint"); *Prewitt v. Factory Motor Parts, Inc.,* 747 F. Supp. 560, 563-64 (W.D. Mo. 1990) (telephone call to Wage and Hour Division to inquire whether employer's new salary plan and work schedule were lawful was protected by section 215(a)(3); "[a] prerequisite to an employee knowing whether to file a complaint is having information about whether an employer's actions may violate the FLSA"); *see also Avitia, supra,* 49 F.3d at 1223-24 (finding evidence sufficient to support finding of retaliation against employee who was fired after he told Department of Labor auditor that he had worked overtime without being compensated at statutory overtime rate of one and one-half times his regular hourly pay). By departing from such decisions, the court has left protected by the statute only those interactions with agency representatives that take place in written form, notwithstanding the fact that oral communications are just as essential to an employee attempting to ascertain her rights and to the Department of Labor in discovering potential violations of the FLSA, and notwithstanding the likelihood that an employer bent on keeping its practices out of view of the regulators might be just as likely to penalize an employee for her oral contacts with the agency as it would any written contacts.

It was precisely these type of inconsistencies that the Supreme Court sought to avoid in *NLRB v. Scrivener,* 405 U.S. 117, 92 S. Ct. 798 (1972), where it construed the anti-retaliation provision of the National Labor Relation Act ("NLRA"), which uses language similar to that of the FLSA. *See Rutherford Food Corp. v. McComb,* 331 U.S. 722, 723-24, 67 S. Ct. 1473, 1473-74 (1947) (noting that decisions interpreting coverage of NLRA have persuasive force as to coverage of FLSA). Section 8(a)(4) of the NLRA makes it an unlawful practice for an employer "to discharge or otherwise discriminate against an employee because he has *filed charges* or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (emphasis supplied). In *Scrivener,* four employees were fired after they were interviewed by and gave sworn written statements to a National Labor Relations Board ("NLRB") field examiner investigating charges of unfair labor practices that had been filed against their employer. None of the discharged employees had themselves filed charges with the NLRB prior to their discharge; they had simply given evidence to the field examiner. The NLRB concluded that the discharges were in violation of section 8(a)(4), 177 N.L.R.B. 504 (1969), but the Eighth Circuit disagreed, concluding that the statute did not prohibit retaliation against an employee who has done nothing more than give a written statement to a field examiner. 435 F.2d 1296 (1971) (per curiam). The Supreme Court sided with the NLRB. "Construing § 8(a)(4) to protect the employee during the investigative stage, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with the objective of that section," the Court noted at the outset. 405 U.S. at 121, 92 S. Ct. at 801. "Congress made it clear that it wishes all persons with information about such [illegal] practices to be completely free from coercion against reporting them to the Board." *Ibid.* (quoting *Nash v. Fla. Indus. Comm'n,* 389 U.S. 235, 238, 88 S. Ct. 362, 365 (1967)). Having in mind. "the practicalities of appropriate agency action," *id.* at 123, 92 S. Ct. at 802, the Court did not think it was logical to protect an employee who has filed a charge or given testimony in an agency proceeding, but not one who has participated in the necessary steps leading up to the filing and prosecution of a charge:

> An employee who participates in a Board investigation may not be called formally to testify or may be discharged before any hearing at which he could testify. His contribution might be merely cumulative or the case may be settled or dismissed before hearing. Which employees receive statutory protection should not turn on the vagaries of the selection process or on other events that have no relation to the need for protection. It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.

Id. at 123-24, 92 S. Ct. at 802 (footnote omitted). The

Court thus concluded that the discharge of the four employees constituted actionable retaliation under the NLRA, not-withstanding the fact that none of the employees had actually filed a charge or given testimony. *Id.* at 125, 92 S. Ct. at 803.

We would do well to heed the logic and warnings of both *Robert DeMario Jewelry* and *Scrivener* in construing the reach of FLSA. Congress has designed a scheme in which individual employees play a crucial role in identifying potential violations of the FLSA and bringing them to the attention of the Department of Labor. *Robert DeMario Jewelry,* 361 U.S. at 292, 80 S. Ct. at 335. This court's decision that an employee's intra-company complaint is protected by section 15(a)(3) pays appropriate homage to that role by extending the statute's reach to the earliest opportunity that an employee has to assert his statutory rights—in the workplace, with his employer. Although the employee has filed nothing and testified to nothing at that point in time, he has nonetheless taken the first step toward the vindication of his rights. If he is penalized for taking that step, he (and his co-workers) might well take no other. That is why, as *Scrivener* explains, it is necessary to construe phrases like "filed charges" or "filed any complaint" liberally to include not only those ultimate acts but all of the necessary preceding steps that culminate in those acts. 405 U.S. at 123-24, 92 S. Ct. at 802. And that is why, in my view, it makes "less than complete sense" to draw a distinction between an employee's written and oral assertions of his rights. *See id. at* 124, 92 S. Ct. at 802. As the cases make clear, virtually any step that an employee may take in pursuit of his rights prior to filing a complaint with the Department of Labor—e.g., inquiring into his rights, questioning the legality of his wages and hours, or cooperating with a Department of Labor investigation—he may do by way of the spoken as well as the written word. Oral inquiries, protests, and information supplied to an agency representative play no less an important role in the statutory scheme than do letters, e-mails, and sworn statements. They must be protected as well.

For these reasons, I believe this case warrants further consideration by the full court, and I respectfully dissent from denial of rehearing en banc.

No. 08-2820

In the
United States Court of Appeals For
the Seventh Circuit

KEVIN KASTEN,
Plaintiff-Appellant,
v.

SAINT-GOBAIN PERFORMANCE PLASTICS
CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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No. 08-2820

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Plaintiff-Appellant,

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SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,
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BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of Plaintiff-Appellant's petition for panel rehearing and rehearing en *banc* on the issue whether oral internal complaints are protected under section 15(a)(3) of the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. 215(a)(3). Specifically, the Secretary and the EEOC support Plaintiff-Appellant's argument that "file[d] any complaint" within the context of the anti-retaliation provision of the FLSA encompasses orally communicating a complaint to an employer. While the panel correctly held that the plain meaning of 29 U.S.C. 215(a)(3) protects internal complaints to an employer, the panel misapprehended the statutory language by requiring that such complaints. be in writing. Therefore, the Secretary and the EEOC believe that panel rehearing is appropriate. *See* Fed. R. App. P. 40(a)(2).

Should panel rehearing be denied, rehearing en *banc* is appropriate in this case because the panel opinion "presents a question of exceptional importance." *See* Fed. R. App. P. 35(b)(1)(B). As the panel acknowledged, its decision conflicts with conclusions of the Sixth, Eighth, and Eleventh Circuits that internal complaints are protected, even when communicated orally. *See, e.g., EEOC v. Romeo Community Schools,* 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989); *Brennan v. Maxey's Yamaha,* 513 F.2d 179 (8th Cir. 1975); *see also Lambert v. Ackerley,* 180 F.3d 997 (9th Cir. 1999) (en *banc)* (panel acknowledged it contains language "favorable" to this position). Moreover, the panel's decision rejects the longstanding position of the Secretary and the EEOC that employees who file oral complaints are protected from retaliation under the FLSA and analogous employee protection provisions of other statutes administered and enforced by the agencies.

STATEMENT OF INTEREST

The Secretary is responsible for administering and enforcing the FLSA, *see* 29 U.S.C. 204(a), 204(b), 216(c), 217, and 215(a)(3), and the EEOC is charged by Congress with the interpretation, enforcement, and administration of the Equal Pay Act of 1963, 29 U.S.C. 206(d), which *is* codified as part of the FLSA and incorporates the section 15(a)(3) protections. These agencies have a substantial interest in the correct interpretation of section 15(a)(3), the FLSA's anti-retaliation provision. The panel interpreted the language, "filed any complaint," to encompass internal, intra-company complaints, but required such complaints to be in writing.

The panel erred in its interpretation of the statute. Section 15(a)(3) does not specify that a complaint must be in writing, nor should the word "file" be construed narrowly in the context of the FLSA. If allowed to stand, the panel's decision would undermine the enforcement of the FLSA by discouraging employees from approaching their employers with information about violations of the Act. Furthermore, the decision could affect the construction of anti-retaliation provisions in other statutes that the Department of Labor ("Department") administers or enforces, many of which are similar to section 15(a)(3) of the FLSA in that they do not expressly protect employees who orally complain to their employers.[1]

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[1] *See, e.g.*, section 11(c) of the Occupational Safety and Health Act ("the OSH Act"), 29 U.S.C. 660(c)(1) (prohibiting retaliation against "any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter..."); section 505 of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. 1855(a) (prohibiting retaliation against worker who has "filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about testify in any such proceeding"); and section 2 of the Solid Waste Disposal Act, 42 U.S.C. 6971(a) (prohibiting retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter").

ARGUMENT

THE PANEL ERRED IN CONCLUDING THAT THE PLAIN LANGUAGE OF 29 U.S.C. 215(a)(3) ONLY PROTECTS EMPLOYEES WHO COMPLAIN TO THEIR EMPLOYERS IN WRITING.

The panel correctly held that "the plain language of the statute indicates that internal, intra-company complaints are protected." *Kasten v. Saint-Gobain Performance Plastics Corp.*, F.3d ---, 2009 WL 1838291, at *3 (7th Cir. June 29, 2009). The panel erred, however, in holding that a complaint to an employer must be in writing. *Id.*, 2009 WL 1838291, at *4.

Section 15(a)(3) of the FLSA provides, in relevant part:

> [I]t shall be unlawful for any person ... to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. 215(a)(3) (emphasis added). In determining that an oral complaint is not protected, the panel placed great emphasis on the word "file," reasoning that the word is commonly understood to require the submission of something in writing. *Kasten*, 2009 WL 1838291, at *4.[2] There *is* nothing in the plain

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[2] The panel relied upon Webster's Ninth New Collegiate Dictionary definition of the verb "to file." *See* 2009 WL 1838291,

language of the statute to support such a requirement. To the contrary, a broader meaning of "file," within the context of the FLSA, is commended by common sense and consistent with an expansive construction of the anti-retaliation provision. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied."); *see also Sapperstein v. Hager*, 188 F.3d 852 (7th Cir. 1999).

The panel's decision requiring internal complaints to be in writing conflicts with decisions of the Sixth, Eighth, and Eleventh Circuits that have concluded that internal complaints are protected, even when communicated orally. *See, e.g., EEOC v. Romeo Community Schools*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th 1989); *Brock v.* Richardson, 812 F.2d 121 (8th Cir. 1987); Brennan *v. Maxey's Yamaha*, 513 F.2d 179 (8th Cir. 1975); *see also Lambert v. Ackerley, supra.* Indeed, the Department is aware of no other court that has held that internal complaints are protected under the FLSA, but only if they are in writing. *But cf. Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993) (internal complaints are not protected).

While the panel acknowledged that under the FLSA "other courts have found oral complaints to be protected activity," it considered those decisions

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at *4. That definition includes the following: "to perform the first act of (as a lawsuit)." *Id.* The "first act" of seeking relief from an employer certainly can include an oral communication.

unpersuasive "because many of them do not specifically state whether the complaint in question was written or purely verbal" and they do not discuss the statute's use of the verb "to file." *Kasten,* 2009 WL 1838291, *5. It is clear from the facts of each of the above-referenced cases, however, that the complaints at issue were oral. In *Romeo Community Schools,* the employee had complained to the school district and "told them she believed they were 'breaking some sort of law' by paying her lower wages than previously paid to male temporary custodians." 976 F.2d at 989. In *White And Son Enters.,* several female employees "met with Ricky White and the foreman to ask why they did not receive a raise as did the men and to request equal pay." 881 F.2d at 1007. The employee in *Maxey's Yamaha* was protected from retaliation after she "voiced her disapproval" to her employer about returning back wages and refused to sign a receipt unless she received her compensation, following a settlement between the employer and the Department of Labor. 513 F.2d at 182. In *Richardson,* the employee was discharged after his employer mistakenly thought that he had complained orally to supervisors. 812 F.2d at 125. See *also Moore v. Freeman,* 355 F.3d 558, 561 (6th Cir. 2004) (employee who orally complained about unequal pay in staff meeting had a claim for retaliation under the FLSA).[3]

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[3] District courts within this Circuit have frequently held that oral complaints are protected under the FLSA. *See, e.g., Hernandez v. City Wide Insulation of Madison,* 508 F. Supp. 2d. 682 (E.D. Wis. 2007) (employees who regularly complained orally to employer about failure to pay overtime were protected under 15(a)(3)); *Skelton v. American Intercont'l Univ. Online,* 382 F. Supp. 2d 1068 (N.D. Ill. 2005) (employees who orally complained to head of human resources at meeting about overtime pay violations were protected from retaliation); *DeGrange v. Richard Wolf Medical Instruments Corp.,* No. 99-

Protecting only written complaints under section 15(a)(3) elevates form over substance to the detriment of unwitting employees. It would mean, for example, that an employee who places a telephone call to the employer's human resources or payroll department asserting FLSA rights would not be protected from discharge or other retaliation, but the employee who reduces his concerns to writing (even in an e-mail, for instance) would be protected. Because it is much more likely that an employee will complain orally to his employer about being improperly paid minimum wage or overtime compensation, it is doubtful that Congress would have intended the panel's cramped reading of the word "file."

Of course, not every "abstract grumbling" or "amorphous expression of discontent" is sufficient. See *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 44 (1st Cir. 1999); *Ackerley*, 180 F.3d at 1007. Rather, "it is clear that so long as an employee communicates the *substance* of his allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by section 215(a) (3)." *Ackerley*, 180 F.3d at 1008 (emphasis in original).

In support of its interpretation, the panel observed that Congress could have used broader

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3614, 2000 WL 1368043 (N.D. Ill. Sept. 15, 2000) (employee who orally complained to human resource manager that he was entitled to pay for the day after Thanksgiving was protected); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654 (N.D. 1997) (employee who orally told employer she would not work extra hours unless paid overtime was protected); *Chisholm v. Foothill Capital Corp.*, 940 F. Supp. 1273 (N.D. Ill. 1996) (employee who complained orally about unequal pay stated cause of action against employer).

language in the FLSA's retaliation provision. *Kasten*, 2009 WL 1838291, at *5. As examples of statutes with broader anti-retaliation provisions, the panel cited Title VII and the Age Discrimination in Employment Act ("ADEA"). The panel's comparison of the language of these statutes with that of the FLSA does not support its conclusion that oral complaints are not protected under section 15(a)(3), because Title VII and the ADEA were enacted many years after the FLSA. As the. Ninth Circuit observed in its *en banc* decision in *Ackerley*, "The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA." 180 F.3d at 1005. Rather, it is reasonable to assume that when enacting the FLSA, Congress was aware that employees in many union and non-union workplaces are required to "file" grievances and complaints with their union or employer before instituting any further internal or external proceedings. *Ackerley*, 180 F.2d at 1004.[4] Indeed, as the Plaintiff-Appellant notes in his petition for panel rehearing and rehearing *en banc* (Pet. Reh'g 10 n.1), citing numerous statutes, "[w]hen Congress intends to require written complaints, it does so expressly." See, e.g., 38 U.S.C. 4322(b) ("Such complaint shall be in writing...."); 2 U.S.C. 437g(a) ("Any person who believes a violation of this Act...has occurred, may file a complaint... Such complaint shall be in writing....").

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[4] Significantly, Plaintiff-Appellant states that under the employment policies of the Defendant-Appellee, employees are encouraged to report complaints to their supervisors and to the Human Resources Manager if the matter is not resolved (Pet. Reh'g at 2-3) (citing Employee Policy Handbook, App. 77).

The panel's reliance on the decision in *Ball v.* Memphis *Bar-B-Q Co., Inc.,* 228 F.3d 360 (4th Cir. 2000), to support its conclusion that complaints must be written to be protected is misplaced. The issue in *Memphis Bar-B-Q* was whether the employee's statement to his employer, that he would be unable to testify the way the employer suggested in a yet to be filed lawsuit, was protected under the anti-retaliation provision "because [he was] about to testify in any ... proceeding [instituted under or related to the FLSA]." The Fourth Circuit analyzed the meaning of "proceeding" and concluded that it refers to procedures conducted in judicial or administrative tribunals, not the making of an intra-company complaint. The court also concluded that a proceeding must be "instituted" and it must provide for "testimony." Furthermore, the Fourth Circuit determined that the terms "testify" and "institute" both connote "a formality that does not attend an employee's oral complaint to his supervisor." *Memphis Bar-B-Q,* 228 F.3d at 364. However, the Fourth Circuit did not consider the "file any complaint" prong at issue here. To the contrary, the Fourth Circuit specifically noted, 228 F.3d at 363, n.*, that in *Rayner v. Smirl,* 873 F.2d 60, 63-64 (4th Cir. 1989), it had construed language similar to the FLSA's complaint clause as covering intra-corporate complaints.[5] Although the nature of the internal complaints in *Rayner* was not at issue, there is nothing to indicate that they were written. *See id.* at 62. Because the Fourth Circuit based its analysis on the testimonial prong the anti-retaliation provision, the panel erred in relying on *Memphis Bar-B-Q* to support its interpretation of the complaint prong.

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[5] *Rayner* involved the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA"), which at the time protected any covered employee who "(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or (2) testified or is about to testify in any such proceeding." 45 U.S.C. 441 (1989). FRSA's anti-retaliation provision was amended on August 3, 2007, by section 1521 of the Implementing

In her *amicus* brief before the panel, the Secretary argued that her interpretation of section 15(a)(3) was entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). The panel, however, citing to *Smiley v. Citibank,* 517 U.S. 735, 741 (1996) and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988), determined that the Secretary's position was not entitled to any deference because it "rests solely on a litigating position." *Kasten,* 2009 WL 1838291, *6 n.2. The panel's reliance on *Smiley* and *Bowen* was misplaced.

In *Auer v. Robbins,* 519 U.S. 452, 462 (1997), the Supreme Court deferred to an interpretation that the Secretary of Labor advanced in an *amicus* brief. Ruling that the Secretary's position was worthy of deference even though advanced in litigation, the Court stated "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* The Court contrasted the situation in *Bowen,* in which it rejected the Secretary of Health and Human Service's interpretation advanced in litigation because it was adopted there for the first time and was inconsistent with the Secretary's prior litigation positions. The Secretary's position here was not adopted for the first time in her *amicus* brief. Nor is the position inconsistent with the Secretary's prior

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Regulations of the 9/11 Commission Act of 2007, Pub. L. 110-53, section 1521, 121 Stat. 266, 444-45 (codified as amended at 49 U.S.C. 20109) (2008).

litigating positions. Indeed, the Department has held the position since at least 1961 when it brought a section 15(a)(3) action on behalf of an employee who lodged an oral complaint. *See Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31, 155, at 40, 986 (D. Utah Aug. 2, 1961). Furthermore, the Secretary filed an *amicus* brief in the Ninth Circuit in *Ackerley* arguing that both oral and written complaints to an employer are protected under section 15(a)(3). Accordingly, there is no reason to suspect that the Secretary's interpretation "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462.[6]

In sum, the purpose of the FLSA is to protect employees by imposing minimum labor standards on covered employers, including the payment of a specified minimum wage and overtime pay. *See* 29 U.S.C. sections 202, 206, 207; *DeMario Jewelry, Inc.*, 361 U.S. at 292. To secure compliance with the substantive provisions of the FLSA, Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Id.* The anti-retaliation provision facilitates the enforcement of the FLSA's standards by fostering an environment in which employees' "fear of economic retaliation" will not cause them "quietly to accept substandard conditions." *Id.* The

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[6] The EEOC treats retaliation under the EPA in the same manner that it treats retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), the Age Discrimination in Employment Act, 29 U.S.C. 623(d), and the Americans with Disabilities Act, 42 U.S.C. 12203(a), all of which contain "opposition" clauses prohibiting retaliation against individuals who oppose any practice made unlawful by those Acts. *See* EEOC Compliance Manual section 8-I(A) & n.12, found at http://www.eeoc.gov/policy/docs/retal.html; *see also Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, ---U.S.---, 129 S. Ct. 846, 849 (2009).

Supreme Court has instructed for over 60 years that the FLSA "must not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 597 (1944). Thus, this Court should interpret the anti-retaliation provision broadly in light of the Act's remedial purpose by holding that complaints to employers asserting violations of the FLSA are protected, whether oral or written.

CONCLUSION

For the forgoing reasons, the Secretary and the EEOC support a panel rehearing in the first instance. Should the panel deny rehearing, the Secretary and the EEOC believe that rehearing *en banc* is warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Plaintiff-Appellant's Petition for Panel Rehearing and Rehearing *En Banc:*

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,117 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B) (iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, with 10.5 characters per inch and Courier New 12 point type style.

7/23/09
DATE

s/
MARY J. RIESER
Attorney

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission As *Amici. Curiae* In Support Of Plaintiff-Appellant's Petition For Panel Rehearing and Rehearing *En Banc* have been served using Federal Express, this 23rd day of July, 2009, on the following counsel:

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In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2820

KEVIN KASTEN,

Plaintiff-Appellant,

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 07-C-0686---Barbara B. Crabb, *Chief Judge.*

ARGUED APRIL 2, 2009—DECIDED JUNE 29, 2009

Before BAUER and FLAUM, *Circuit Judges,* and KAPALA, *District Judge.**

FLAUM, *Circuit Judge.* Plaintiff Kevin Kasten appeals the district court's grant of summary judgment to defendant Saint-Gobain Performance Plastics Corporation ("Saint-Gobain"). Kasten claims that the district court erred in its interpretation of the Fair Labor Standards Act when it determined that Kasten had not suffered retaliation within the meaning of the statute. For the reasons explained below, we affirm the judgment of the district court.

I. Background

Defendant Saint-Gobain is a corporation that manufactures a variety of high-performance materials at facilities throughout the country. Plaintiff Kevin Kasten worked in Saint-Gobain's Portage, Wisconsin facility from October 2003 to December 2006.

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* Of the Northern District of Illinois, sitting by designation.

In order to receive their weekly paychecks, Saint-Gobain hourly employees must use a time card to swipe in and out of an on-sight Kronos time clock. On February 13, 2006, Kasten received a "Disciplinary Action Warning Notice - Verbal Counseling Warning" from Saint-Gobain because of several "issues" Kasten had with regard to punching in and out on the Kronos time clocks. The notice stated that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued." Kasten signed the notice, acknowledging that he read and understood it.

On August 31, 2006, Kasten received a written warning from defendant, again related to swiping in and out on the Kronos clocks. The notice stated that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination." Kasten signed the written warning, again acknowledging that he read and understood it.

On November 10, 2006, plaintiff received yet another written warning from Saint-Gobain for failure to swipe in and out, this time accompanied by a one day disciplinary suspension. The warning stated that "[t]his is the last step of the discipline process" and that if another violation occurred, further discipline, including termination, could result. Kasten signed the warning, again acknowledging that he read and understood it.

Plaintiff alleges (though defendant disputes) that from October through December, 2006, he verbally complained to his supervisors about the legality of the location of SaintGobain's time clocks. Specifically, Kasten claims that he told his supervisors that the location of the Kronos clocks prevented employees from being paid for time spent donning and doffing their required protective gear. Regarding his complaints, plaintiff alleges (1) that he told Dennis Woolverton (his shift supervisor) that he believed the location of defendant's time clocks was illegal; (2) that he told Lani Williams (a Human Resources generalist) that the location of the time clocks was illegal; (3) that he told April Luther (a "Lead Operator" and apparently another of Kasten's supervisors) that the location of the time clocks was illegal; and (4) that he told Luther that he was thinking of commencing a lawsuit regarding the location of defendant's time clocks. Saint-Gobain denies that Kasten ever told any of his supervisors or any human resources personnel that he believed that the clock locations were illegal.

On December 6, 2006, Saint-Gobain suspended Kasten on the ground that he had violated its policy regarding time clock punching for the fourth time. Kasten claims that at a meeting regarding this suspension, he again verbally told his supervisors that he believed the location of the clocks was illegal and that if he challenged the company in court regarding the location of the clocks the company would lose. Saint-Grobain disputes that Kasten complained about the time clocks at this meeting. On December 11, 2006, Human Resources Manager Dennis Brown told Kasten over the phone that Saint-

Gobain had decided to terminate his employment.

Kasten filed suit under the FLSA, claiming that he had been terminated in retaliation for his verbal complaints regarding the location of the time clocks. The district court granted summary judgment to defendant, finding that Kasten had not engaged in protected activity because he had not "filed any complaint" about the allegedly illegal location of the time clocks. Kasten appeals.

II. Discussion

The FLSA provides private remedies for employees who have suffered adverse employment actions as a result of engaging in certain protected activities. Section 215(a)(3) of the statute defines the scope of protected activity. It states, in relevant part:

> [I]t shall be unlawful for any person...to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

Here, Kasten seeks to establish a claim for retaliation based solely on his allegation that he "filed complaints" with his employers regarding the location of the time clocks. To determine whether Kasten engaged in protected activity, we must answer two questions about the scope of the FLSA's retaliation provision: first, whether intra-company complaints that are not formally filed with any judicial or administrative body are protected activity;

and second, whether unwritten verbal complaints are protected activity.

The district court found that intra-company complaints were protected activity but concluded that unwritten verbal complaints were not protected activity. Kasten argues, along with a supporting amicus brief filed by the U.S. Secretary of Labor, that we should reverse the second portion of the district court's ruling holding that unwritten complaints are not protected activity under the statute. They claim that the FLSA retaliation provision should be read expansively to protect employees who make only internal, unwritten objections to their employers.

We review the district court's grant of summary judgment to defendant de novo and view the evidence in the light most favorable to the appellant. *Hancock v. Potter,* 531 F.3d 474, 478 (7th Cir. 2008).

A. Internal Complaints

The Seventh Circuit has not directly addressed whether internal complaints are protected activity under the FLSA's retaliation provision, though we have reviewed two cases involving internal complaints without commenting on the matter. *See Scott v. Sunrise Health Care Corp.,* 195 F.3d 938, 940-41 (7th Cir. 1999) (affirming dismissal of FLSA retaliation case because plaintiff had not shown a causal connection between her complaints and her later discharge); *see also Shea v. Galaxie Lumber Constr. Co.,* 152 F.3d 729, 731, 734-36 (7th Cir. 1998) (reversing a denial of punitive damages in a case where an employee had been discharged after complaining to the company president).[1]

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[1] It appears that the parties in those cases did not raise the

Statutory interpretation begins with "the language of the statute itself [and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Sapperstein v. Hager,* 188 F.3d 852, 857 (7th Cir. 1999) (internal quotation marks and citation omitted) (interpreting retaliation provision of FLSA but not discussing whether internal complaints were protected conduct); *see also Consumer Prod. Safety Comm'n v. GTE Sylvania,* 447 U.S. 102, 107 (1980). Here, the plain language of the statute indicates that internal, intracompany complaints are protected. The retaliation provision states that it is "unlawful for any person to discharge ... any employee because such employee has filed *any complaint* . . ." 29 U.S.C. § 215(a)(3) (emphasis added). As Kasten points out, the statute does not limit the types of complaints which will suffice, and in fact modifies the word "complaint" with the word "any." Thus, the language of the statute would seem to include internal, intracompany complaints as protected activity.

The majority of circuit courts considering the question have also found that "any complaint" includes internal complaints. *See Hagan v. Echostar Satellite,* LLC, 529 F.3d 617, 625 (5th Cir. 2008) (internal complaint constitutes protected activity); *Moore v. Freeman,* 355 F.3d 558 (6th Cir. 2004) (informal complaints are protected activity); *Lambert v. Ackerly,* 180 F.3d 1004, 1004 (9th Cir. 1999) (section 15(a)(3) protects "employees who complain about violations to their employers"); *Valerio v. Putnam Associates, Inc.,* 173 F.3d 35, 41 (1st Cir. 1999) ("By failing to specify that the filing of any complaint need be with a court or an agency, and by

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issues we are considering in this appeal.

using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest ... conveyed to an employer."); EEOC v. *White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989) (employees' internal complaints to supervisor about unequal pay were assertions of rights under the Equal Pay Act, part of the FLEA); *Love* v. *RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (same); *but see Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-365 (4th Or. 2000) (holding that 29 U.S.C. § 215(a)(3) does not protect internal complaints).

Because we conclude, in line with the vast majority of circuit courts to consider this issue, that the plain language of 29 U.S.C. § 215(a)(3) includes internal complaints as protected activity, we affirm the judgment of the district court in this regard.

B. Unwritten Complaints

The next question pertinent to this appeal is whether unwritten, purely verbal complaints are protected activity under the statute.

Again, we start with the language of the statute. *Sapperstein*, 188 F.3d at 857. The FLSA's retaliation provision prohibits "discharg[ing]...any employee because such employee has *filed any* complaint..." 29 U.S.C. § 215(a)(3) (emphasis added). The district court reasoned:

> Expressing an oral complaint is not the same as filing a complaint. By definition, the word "file" refers to "a collection of papers, records, etc., arranged in a convenient order," Random House Webster's College Dictionary 489 (2d ed. 1999), or, when used in verb form as it is in the statute, "[t]o deliver (a paper or instrument) to

> the proper officer so that it is received by him to kept on file, or among the records of his office," Webster's New International Dictionary of the English Language 945 (2d ed. 1958). One cannot "file" an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place.

Plaintiff disagrees with this interpretation. He argues that "to file" is a broad term that has several meanings, including, generally, "to submit."

Looking only at the language of the statute, we believe that the district court correctly concluded that unwritten, purely verbal complaints are not protected activity. The use of the verb "to file" connotes the use of a writing. Webster's Ninth New Collegiate Dictionary defines the verb "to file" as

> 1. to arrange in order for preservation and reference <"file letters"> 2. a: to place among official records as prescribed by law <"file a mortgage"> b: to perform the first act of (as a lawsuit) <"threatened to file charges against him">

This definition accords with what we believe to be the common understanding of the verb "to file." Although Kasten and the Secretary of Labor claim that "to file" can mean, generally, "to submit," this seems to us overbroad.[2] If an individual told a friend that she

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[2] The Secretary of Labor claims that because "it is not clear from the phrase 'file any complaint' that a complaint must be in writing, the Secretary's reasonable interpretation that both oral and written complaints are protected is entitled to *Skidmore* deference." However, the Secretary's interpretation of "filed any complaint" appears to rest solely on a litigating position rather than on a Department of Labor regulation, ruling, or administrative practice, and is therefore not entitled to defer-

"filed a complaint with her employer," we doubt the friend would understand her to possibly mean that she merely voiced displeasure to a supervisor. Rather, the natural understanding of the phrase "file any complaint" requires the submission of some writing to an employer, court, or administrative body. *See United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) ("Words in a statute are to be given their plain and ordinary meaning.") (citing *United States v. James*, 478 U.S. 597, 604 (1986)).

Other circuit courts that have tackled this issue are split. The Fourth Circuit found that verbal complaints were not protected activity in *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364 (4th Cir. 2000). The court recognized that the FLSA's "statutory language clearly places limits on the range of retaliation proscribed by the act." Specifically, in interpreting the "testimony" clause of the FLSA's retaliation provision, the Fourth Circuit held that the FLSA "prohibits retaliation for testimony given or about to be given *but not for an employee's voicing of a position* on working conditions in opposition to an employer." *Id.* (emphasis added). Although the Fourth Circuit acknowledged that the retaliation in that case—which followed an employee's statement to the company president that, if he were deposed in a lawsuit, he would not testify to the president's suggested version of events—was "morally unacceptable," the court concluded that a faithful interpretation of the statute did not recognize mere

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ence. *See Smiley v. Citibank*, 517 U.S. 735, 741 (1996) ("[W]e deny deference 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' The deliberateness of such positions, if not indeed their authoritativeness, is suspect.") (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)).

statements to a supervisor as a protected activity. *Id.; see also Lambert v. Genesee Hospital,* 10 F.3d 46, 55 (2d Cir. 1993) ("The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.") (citations omitted).

Other courts have found oral complaints to be protected activity, but it is difficult to draw guidance from these decisions because many of them do not specifically state whether the complaint in question was written or purely verbal, and none discusses the statute's use of the verb "to file" and whether it requires a writing. *See* EEOC *v. Romeo Community Schools,* 976 F.2d 985, 989-90 (6th Cir. 1992) (holding, without discussion of the verbal/written distinction, that plaintiff's apparently oral complaints to supervisors were protected activity); EEOC *v. White & Son Enters.,* 881 F.2d 1006, 1011 (11th Cir. 1989) (holding, without discussion of the verbal/written distinction, that plaintiffs' oral complaints were protected activity); *Brock v. Richardson,* 812 F.2d 121, 125 (8th Cir. 1987) (holding, without discussion of the verbal/written distinction, that defendant's mistaken belief that plaintiff had made apparently oral complaints to supervisors was grounds for suit); *Brennan v. Maxey's Yamaha,* 513 F.2d 179, 183 (8th Cir. 1975) (holding, without discussion of the verbal/written distinction, that employee's "voicing" of concern was protected activity).[3]

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[3] The plaintiff and Secretary of Labor cite *Lambert v. Ackerley,* 180 F.3d 997 (9th Cir. 1999) and *Love v. RE/MAX of America, Inc.,* 738 F.2d 383 (10th Cir. 1984) to support their contention that unwritten complaints are covered by the statute. However, although *Ackerley* and *Love* contain favorable language for their argument, *see Ackerley at* 1008 ("[I]t is clear that so long as an

Despite these contrary findings by some other circuits, our interpretation of the phrase "file any complaint" is confirmed by the fact that Congress could have, but did not, use broader language in the FLSA's retaliation provision. For example, analogous provisions in other statutes, including Title VII and the Age Discrimination in Employment Act, forbid employers from retaliating against any employee who "has opposed any practice" that is unlawful under the statutes. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d). This broader phrase, "opposed any practice," does not require a "fil[ing]," and has been interpreted to protect verbal complaints. *See, e.g., Kotcher v. Rosa and Sullivan Appliance* Ctr., *Inc.,* 957 F.2d 59, 65 (2d Cir. 1992). Congress's selection of the narrower "file any complaint" language in the FLSA thus appears to be significant. *See Ball,* 228 F.3d at 364 (noting that "Congress has crafted . . . broader anti-retaliation provisions elsewhere" but "the cause of action for retaliation under the FLSA is much more circumscribed"); *Genesee Hospital,* 10 F.3d at 55 (noting that the FLSA uses narrower language in its retaliation provision than Title VII).

Finally, we are aware that "'the remedial nature of the [FLSA] . . . warrants an expansive interpretation of its provisions . . . '" *Sapperstein,* 188 F.3d at 857 (quoting *Herman v. RSR Security Services,* 172 F.3d 132, 139 (2d Cir. 1999)). But expansive interpretation is one thing; reading words

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employee communicates the *substance* of *his* allegations to the employer ... he is protected by section 215(a)(3)); *Love, at* 387 ("the unofficial assertion of rights through complaints at work" is protected activity); those cases concerned written complaints filed with employers.

out of a statute is quite another. Because we believe that the FLSA's use of the phrase "file any complaint" requires a plaintiff employee to submit some sort of writing, we agree with the district court's conclusion that Kasten's alleged complaints were not protected activity under the statute.

III. Conclusion

For the reasons explained above, we affirm the judgment of the district court.

No. 08-2820

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KEVIN KASTEN,
Plaintiff-Appellant,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Wisconsin

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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No. 08-2820

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN KASTEN,
Plaintiff-Appellant,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this Brief as *amicus curiae* in support of Plaintiff-Appellant. The Secretary supports Plaintiff-Appellant's argument that the district court erred in holding that section 15(a)(3) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 215(a)(3), does not protect an employee who makes an oral complaint to his employer alleging violations of the Act.

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in the proper construction of section 15(a)(3) because she

administers and enforces the FLSA, see 29 U.S.C. 204(a), 204(b), 216(c), 217, and section 15(a)(3) is central to achieving FLSA compliance. *See Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Furthermore, the principles at issue could affect compliance, under the anti-retaliation provisions of other statutes for which the Secretary has responsibility. The Department of Labor administers or enforces numerous anti-retaliation provisions, the majority of which are similar to section 15(a)(3) of the FLSA in that they do not expressly protect employees who internally complain to their employers. *See, e.g.*, section 11(c) of the Occupational Safety and Health Act ("the OSH Act"), 29 U.S.C. 660(c)(1) (prohibiting retaliation against "any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter..."); section 505 of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. 1855(a) (prohibiting retaliation against worker who has "filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about testify in any such proceeding"); and section 2 of the Solid Waste Disposal Act, 42 U.S.C. 6971(a) (prohibiting retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter"). The Secretary has taken the position that internal complaints to an employer, whether written or oral, are protected. Thus, a decision by this Court that internal complaints are not covered, or that internal complaints that are oral are not covered, would have an adverse impact upon the effective administration of the Department of Labor's programs.

STATEMENT OF THE ISSUE

Whether section 15(a)(3) of the FLSA protects an employee who makes an oral complaint to his employer alleging violations of the Act.

STATEMENT OF THE CASE

A. Procedural History and Statement of Facts

Kevin Kasten brought this action on December 5, 2007, against Saint-Gobain Performance Plastics Corporation ("Saint-Gobain"), a manufacturer of high-performance polymer products with a production facility in Portage, Wisconsin. *See Kasten v. Saint-Gobain Performance Plastics* Corp., 2008 WL 2489925,*1-*2 (W.D. Wis. June 19, 2008). Kasten, who worked at Saint-Gobain's Portage facility from October 2003 until December 2006 as a manufacturing and production worker, alleged that Saint-Gobain violated section 15(a)(3) of the FLSA when it discharged him in retaliation for repeatedly complaining to his supervisors that the positioning of time clocks required employees to spend unpaid time donning and doffing personal protective gear. *Id.*[1] Kasten contended that in the last months of 2006 he repeatedly complained to his supervisors, including Saint-Gobain's Human Resources Generalist and Human Resources Manager, that the location of Saint-Gobain's time clocks was illegal. *Id.* at *2. Kasten alleged that these complaints included orally notifying a supervisor in October 2006 that he was considering filing a lawsuit regarding the time clock issue and orally advising several supervisors on December 6, 2006, that Saint-Gobain would lose if challenged in court regarding the time clock locations. *Id.* Kasten did not contend that he made any complaints in writing.

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[1] This case originally was consolidated with an FLSA collective action brought by Saint-Gobain employees seeking, inter *alia*, compensation for time spent donning and doffing personal protective gear required by the employer as well as time spent walking to their work areas after they donned their gear.- Kasten's section 15(a) (3) action was severed from the collective action on May 14, 2008. On June 2, 2008, the district court granted partial summary judgment to the collective action plaintiffs, concluding that their donning and doffing and walking time was compensable as hours worked under the FLSA. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 955-56 (W.D. Wis. 2008).

Saint-Gobain issued several disciplinary warnings to Kasten in 2006 before finally terminating him regarding issues relating to punching in and out on the company's time clocks. See *Kasten,* 2008 WL 2489925, at *1. Saint-Gobain denied, however, that Kasten told any of his supervisors that he thought the location of the time clocks resulted in uncompensated time.

Saint-Gobain moved for summary judgment on the ground that, even accepting Kasten's proposed facts as true, Kasten did not "file any complaint" under the FLSA's anti-retaliation provision and, therefore, his complaints were not protected activity. *See id. at* *2. The district court granted summary judgment to Saint-Gobain on June 19, 2008.

B. The District Court's Decision

In granting summary judgment to Saint-Gobain, the district court held that oral complaints are not protected activity covered under section 15(a)(3). *See Kasten*, 2008 WL 2489925, at *3. While recognizing a split in the circuits with respect to the form a complaint must take to be protected under the language of the FLSA, ranging from oral complaints to a supervisor to a formal complaint filed with an agency or court, the court noted that the Seventh Circuit had not directly addressed the issue. *See id.* The district court-concluded that although the FLSA should be interpreted broadly, the plain language of the statute requires a "middle-of-the-road approach" in determining what constitutes the filing of a complaint. See *id.* at *4. Accordingly, the court determined that complaints to an employer are covered under section 15(a)(3), but only if such complaints are "filed." See id. After examining the dictionary definition of "file," the court concluded that "[o]ne cannot file an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place. An oral complaint can become a filed complaint only if it is committed to document form." *Id.* Finally, citing *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999) and *Lambert* v. *Ackerley*, 180 F.3d 997, 1002-05 (9th Cir. 1999) (en banc), the court concluded that even if oral complaints were covered under section 15(a)(3), Kasten's complaints did not constitute protected activity because they could be characterized as "abstract grumbling" or an "amorphous expression of discontent." *See Kasten*, 2008 WL 2489925, *4.

ARGUMENT

SECTION 15(a)(3) OF THE FLSA PROTECTS AN EMPLOYEE WHO MAKES A COMPLAINT TO HIS EMPLOYER, EITHER ORALLY OR IN WRITING, ALLEGING VIOLATIONS OF THE ACT.

A. Section 15(a)(3) Covers Internal Complaints

When the FLSA was enacted in 1938, Congress included an anti-retaliation provision at section

15(a)(3). Section 15(a)(3) of the FLSA provides, in relevant part:

> [I]t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding [.]

29 U.S.C. 215(a)(3). The Supreme Court has recognized that this anti-retaliation provision is critical to ensuring effective compliance with the substantive provisions of the FLSA. *See DeMario Jewelry*, 361 U.S. at 292. Compliance with the FLSA depends on employees providing information about violations of the statute without fear of retaliation. "Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Id.*

By contrast, any interpretation that discourages an employee from complaining to his employer about minimum wage and overtime violations would undermine the FLSA. "[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *DeMario Jewelry*, 361 U.S. at 292. By proscribing retaliation, the Court observed, "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Id.; see Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67 (2006) (citing *DeMario*

Jewelry, Court states that Title VII's anti-retaliation provision seeks "to provide broad protection from retaliation [that] helps assure the cooperation upon which accomplishment of the Act's primary objective depends").

Relying on *DeMario Jewelry* and in order to effectuate Congress's intent, a clear majority of appellate courts have broadly construed section 15(a)(3)'s language prohibiting retaliation against an employee who "has filed any complaint or instituted or caused to be instituted any proceeding" to protect "internal" complaints to management. *See Hagan v. Echostar Satellite, L.L.C.,* 529 F.3d 617, 625 (5th Cir. 2008) (informal, internal complaint constitutes protected activity under FLSA 'anti-retaliation clause "because it better captures the anti-retaliation goals of that section."); *Moore v. Freeman,* 355 F.3d 558 (6th Cir. 2004) (section 15(a)(3) can be triggered by informal complaints); *Ackerley,* 180 F.3d at 1004 (section 15(a)(3) protects "employees who complain about violations to their employers"); *Valerio,* 173 F.3d At 43-45 (section I5(a)(3) protects an employee who has filed complaint with employer); *EEOC v. White & Son Enterprises,* 881 F.2d 1006, 1011 (11th Cir. 1989) (employees' unofficial internal. complaints to their supervisor about unequal pay constituted assertion of rights protected under Equal Pay Act, part of the FLSA); Love *v. RE/MAX of America, Inc.,* 738 F.2d 383, 387 (10th Cir. 1984) (Equal Pay Act's anti-retaliation provision "applies to the unofficial assertion of rights through complaints at work"); *see also Saffels v. Rice,* 40 F.3d 1546 (8th. Cir. 1994) (FLSA protects employees who are discharged due to employer's mistaken belief that they reported FLSA violations to authorities); *Brock v. Richardson,* 812 F.2d 121, 124-125 (3d Cir. 1987) (same); *Brennan v.*

Maxey's Yamaha, Inc., 513 F.2d 179, 181 (8th Cir. 1975) (employee protected under section 15(a)(3) for complaining to employer about returning back wages following employer's settlement with the Wage and Hour Division). But *see Whitten* v. *The City of Easley,* 62 Fed. Appx. 477 (4th Cir. 2003) (unpublished) (concluding that *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-65 (4th Cir. 2000), held section 15(a)(3) does not protect internal complaints); *Lambert v. Genesee Hosp.*, 10 F.3d. 46, 55 (2d Cir. 1993) (plain language of section 15(a)(3) does not encompass complaints made to a supervisor).

In construing section 15(a)(3) to cover internal complaints, courts have concluded that the statutory language "filed any complaint" *is* susceptible to differing interpretations. See *Ackerley,* 180 F.3d. at 1004; *Valerio,* 173 F.3d at 41. In *Ackerley*, the Ninth Circuit reasoned that read literally, section 15(a)(3) extends to "complaints" made to employers. The court also stated that it was convinced that the term "filed" includes filing complaints with employers. See *Ackerley,* 180 F.3d at 1004 ("Given the widespread use of the term 'file' to include the filing of complaints with employers, it is therefore reasonable to assume that Congress intended that term as used in section 215(a)(3) to include the filing of such complaints.").

Similarly, after noting that the word "complaint" is ambiguous, the First Circuit in *Valerio* stated that "[bly failing to specify that the filing of any complaint need be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest...conveyed to an employer." *Valerio,* 173 F.3d at 41. Previously, in interpreting similar statutory language contained in the whistleblower protection provision of the Surface

Transportation Assistance Act ("STAA"), 49 U.S.C. 31105, the First Circuit ruled that "interpreting 'filed a complaint' to encompass only filings with a court or government agency would create a redundancy in the statute." *Clean Harbors Envtl. Servs., Inc. v. Herman,* 146 F.3d 12, 20 (1st Cir. 1998). The court reasoned that because STAA protects employees who have 'filed a complaint' or 'begun a proceeding,' and because a court or agency filing itself begins a proceeding, the "file a complaint" language would be superfluous if it was not intended to cover internal complaints.[2] *Id.* This reasoning is equally applicable to section 15(a)(3) of the FLSA.

Appellate courts also have affirmed decisions by the Secretary and the Administrative Review Board (to which the Secretary has delegated authority to issue final agency decisions in whistleblower cases, *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002)) holding that internal complaints to employers are protected under other whistleblower statutes that do not expressly cover internal complaints. *See, e.g., Passaic Valley Sewerage Comm'rs v. Department* of *Labor,* 992 F.2d 474, 478 (3d Cir. 1993) (Clean Water Act's employee protection provision protects employees who complain to their employer); *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 15101512 (10th Cir. 1985) (pre-1992 amended Energy Reorganization Act whistleblower provision covers internal complaints); *MacKowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) (same).[3] These agency decisions interpreting whistleblower protection statutes with language similar to that contained in section 15(a)(3) of the FLSA as protecting internal complaints are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See United States v. Mead* Corp., 533 U.S. 218, 219 (2001) ("[A] reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the... adjudication process that produces the... rulings for which deference *is* claimed.").

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[2] On August 3, 2007, STAA's whistleblower protection provision was amended as part of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266. The provision, however, still contains language prohibiting retaliation against an employee who "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding." *See* 49 U.S.C. 31105(a) (1) (A) (i) (2008).

Although this Court has not specifically addressed whether section 15(a)(3) applies to internal complaints, it has held that filing a complaint with a state agency is protected under the FLSA. *See Sapperstein v. Hager, 188* F.3d 852, 857 (7th Cir. 1999) (whistleblower is protected even if employer's reported conduct turns out to be lawful). Recognizing the remedial nature of the FLSA, this Court adopted an expansive interpretation of section 15(a) (3), stating that "Congress...wanted to encourage reporting of suspected violations by extending protection to employees who filed complaints, instituted proceedings, or indeed, testified in such proceedings, as long as these concerned the minimum wage or maximum hours *laws." Sapperstein,* 188 F.3d at 857. Moreover, giving no indication that internal complaints might not be protected activity, this Court decided a case on the merits involving an internal complaint, see Scott *v. Sunrise Health Care Corp.,* 195 F.3d 938, 940-41 (7th Cir. 1999), and reversed a denial of punitive damages to an employee discharged after complaining to the company president in *Shea v. Galaxie Lumber & Constr.* Co., 152 F.3d 729, 731, 734-36 (7th Cir. 1998).

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[3] The Fifth Circuit initially held that the whistleblower provision of the Energy Reorganization Act, prior to its amendment in 1992, did not cover internal complaints. *See Brown* & Root, *Inc. v. Donovan*, 747 F.2d 1029, 1031-32 (5th Cir. 1984). However, in *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005), the Fifth Circuit noted that its holding in *Brown & Root* was legislatively overruled and that Congress always had intended the ERA to protect internal complaints.

The Secretary urges this Court to conclude, along with the majority of appellate courts, that section 15(a)(3) protects internal complaints. The Secretary's consistent, reasonable interpretation of section 15(a)(3) is entitled to deference under *Skidmore v. Swift &* Co., 323 *U.S.* 134, 139-40 (1944), because it reflects the agency's fair and considered judgment. *See Christensen v. Harris County,* 529 U.S. 576, 587 (2000); Old *Ben Coal Co. v. Director, Office of Workers' Compensation Programs,* 292 F.3d 533, 541-42, n.8 (7th Cir. 2002).

B. Oral As Well As Written Internal Complaints Are Protected

No appellate court that has recognized that internal complaints are covered under section 15(a)(3) of the FLSA has held that oral complaints are *not* protected. In *Ackerley,* the Ninth Circuit determined that both oral and written internal complaints are protected under the, FLSA's anti-retaliation provision. The court stated that "it is clear that so long as an employee communicates the *substance* of his allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by section 215(a)(3)." *Ackerley,* 180 F.3d at 1008 (emphasis in original). The court also observed that "[other] circuits have held, moreover, the employee may communicate such allegations orally or in writing, and need not refer to the statute by name." *Id., citing EEOC v. Romeo Community Schools,* 976 F.2d 985, 989 (6th Cir. 1992).

In *Romeo Community Schools,* 976 F.2d at 989, the Sixth Circuit likewise held, in a case arising under the Equal Pay Act (codified as part of the FLSA), that an employee's oral complaint to her employer about being paid less than male employees was protected under section 15(a)(3). The Sixth Circuit relied on a similar conclusion reached by the Tenth Circuit in *RE/MAX of America,* 738 F2d at 387 (quoting *Maxey's Yamaha,* 513 F.2d at 181), in which the court stated that section 15(a)(3) "applies to the unofficial assertion [of] rights through complaints at work." *See Romeo Community Schools,* 976 F.2d at 989; *see also Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 227-29 (6th Cir. 1987) (STAA protects oral complaints to employer).

A number of district courts, including several in this Circuit, also have concluded that section 15(a)(3) of the FLSA protects oral complaints to an employer. *See, e.g., Hernandez v. City Wide Insulation of Madison, Inc.,* 508 F. Supp. 2d 682, .689 (E.D. Wis. 2007); *Skelton v. Am. Intercont'l Univ. Online,* 382 F. Supp. 2d 1068, 1076 (N.D. Ill. 2005); *Wittenberg v. Wheels, Inc.,* 963 F. Supp. 654, 658 (N.D. In. 1997); *Goldberg v. Zenger,* 43 Lab. Cas. (CCH) ¶ 31,155 (D. Utah. Aug. 2, 1961). In so concluding, the court in

Zenger, 43 CCH Lab. Cas. at 40,986, stated that "I am mindful that the word 'file' ordinarily has reference to a written document, and may connote physical delivery to an officer or other person. But in the' colloquial, 'file' is often used interchangeably with 'lodge' or sometimes with 'communicate.'"

Indeed, the Secretary has consistently interpreted the phrase "file any complaint" to include protection for employees who orally complain to their employers, as demonstrated by the Department of Labor's enforcement actions on behalf of employees in such cases as *Brock* v. *Casey Truck Sales, Inc.*, 839 F.2d 872, 875, 879 (2d Cir. 1988), *Maxey's Yamaha, Inc.*, and *Zenger*.[4] Similarly, in *Marshall v. Power City Elec., Inc.*, No. 77-197, 1979 WL 23049, *1 (E.D. Wash. Oct. 23, 1979), the Secretary brought an action under the OSH Act alleging that the employer retaliated against employees who made oral complaints to their employer in violation of section 11(c) of the Act. As noted above (p. 2), the language contained in section 11(c) of the OSH Act mirrors that contained in section 15(a)(3) of the FLSA.[5] In rejecting the employer's argument that the employee's internal oral complaint was not protected, the court in *Power City Elec.* stated, "[t]he statute nowhere explicitly requires a written complaint to confer protection.... The Court further holds that the term 'filed' as used in this clause means 'lodged' and is not limited to a written form of complaint." *But see Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999) ("The word 'filed' clearly denotes a procedure other than oral.").

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[4] The Secretary also filed a brief as *amicus curaie* with the Ninth Circuit in *Ackerley* to argue that both oral and written complaints to an employer are protected under section 15(a)(3).

[5] The Secretary also permits complaints to the agency under section 11(c) of the OSH Act to be orally "filed." *See Whistleblower Investigations Manual*, ch. 7.V.A., page 7-1 (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id.3016). Notably, several states also recognize that oral complaints can be "filed." *See, e.g.*, Miss. Code Ann. § 69-47-23(4) (organic food certification program) ("Any person with cause to believe that any provision of this chapter has been violated may file a written or oral complaint with the department setting forth the facts of the alleged violation."); Nevada Revised Statutes 618.705 (occupational safety and health statute) ("Any person who... (2)

In interpreting the phrase "file any complaint" to protect oral complaints that are made to an employer, the Secretary *is* cognizant that the terms "file" and "complaint" have several meanings. *See, e.g., The New Shorter Oxford English Dictionary* 459, 947 (1993) (defining "complaint" as "an expression of grievance or injustice suffered" and "file" as "[to] submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority"); *The Random House College Dictionary* 493 (1982) (defining "file" as "[t]o submit (an application, petition, etc.)"; *The American Heritage Desk Dictionary* 369 (1981) (defining "file" as "to present for consideration"); and *Webster's Third New Int'l Dictionary* 464 (1986) (defining "complaint" as an "act or action of expressing protest, censure, or

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Knowingly files a false oral or written complaint alleging that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists"); and N.J. Stat. Ann. 30:4C-12 (child welfare) ("Whenever it shall appear that the parent or parents, guardian, or person having custody and control of any child within this State is unfit to be entrusted with the care and education of such child, or shall fail to provide such child with proper protection, maintenance and education, or shall fail to ensure the health and safety of the child, or is endangering the welfare of such child, a written or oral complaint may be filed with the division....").

resentment"). But *see, e.g., Artuz v. Bennett,* 531 U.S. 4, 8 (2000) (in discussing when a state-court postconviction relief application is properly "filed," Court stated that "filed" means delivered to and accepted by the appropriate court or officer for placement on the official record). Thus, while the terms "file" and "complaint" may have a narrow meaning when referring only to a formal document that institutes a lawsuit, when the terms are used more generally, they have broader meanings that are not restricted to formal, written documents. As it *is* not clear from the phrase "file any complaint" that a complaint must be in writing, the Secretary's reasonable interpretation that both oral and written complaints are protected is entitled to *Skidmore* deference. See *Old Ben Coal Co.*, 292 F.3d at 542, n.8; *AFGE v. Rumsfeld,* 262 F.3d 649, 656 (7th Cir. 2001).[6]

Protecting only written complaints would elevate form over substance, because in the workplace an employee is more likely to approach an employer with an oral complaint about wage and hour practices, rather than providing a written document. For example, unless the decision of the court below is reversed, an employee who telephones the human resources department asserting FLSA rights could be subject to discharge or retaliation without receiving the protection of section 15(a)(3), while an employee who raises the same issue in writing would be protected. Nothing in the statutory language suggests that such a distinction was intended. Indeed, "the [Supreme] Court has made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions." *Richardson,* 812 F.2d at 124 (citing *DeMario Jewelry,* 361 U.S. at 292). Any form of prior, specific notification to an employer of violative conduct should be encouraged. As the Third Circuit stated in *Passaic Valley,* 992 F.2d at 478-79, in determining that internal complaints are covered under the Clean Water Act's whistleblower protection provision, "[e]mployees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations.... [I]t is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act."

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[6] Not all expressions of discontent constitute complaints. These dictionary definitions of "file" encompass a "submission," i.e., *a* clear intent to complain, rather than an offhand remark. *See, e.g., Ackerley,* 180-F.3d at 1007 ("not all amorphous expressions of discontent about wages and hours constitute complaints filed...."). Whether an employee's statement to his or her - supervisor constitutes a complaint, rather than abstract grumbling, is a fact-specific inquiry. The Secretary takes no position whether under the facts of this case Kasten's comments to his supervisors constituted a complaint.

In sum, this Court should uphold as reasonable the Secretary's interpretation of section 15(a)(3) as providing protection to employees who orally complain to their employers about FLSA violations.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling in this case that section 15(a)(3) does not cover internal oral complaints.

Respectfully, submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of this Brief for the Secretary of Labor As *Amicus. Curiae* in Support of Plaintiff-Appellant have been served on the following counsel of record by first class mail, postage prepaid, this 18th day of November, 2008:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEVIN KASTEN,

OPINION AND ORDER

Plaintiff,

07-cv-686-bbc[1]

v.

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Defendant.

In December 2007 plaintiff Kevin Kasten filed this civil action alleging that defendant Saint-Gobain Performance Plastics Corporation's decision to terminate plaintiff's employment was a form of retaliation against him in violation of 29 U.S.C. § 215(a)(3). Jurisdiction is present. 28 U.S.C. § 1331. Currently before the court is defendant's motion for summary judgment, which will be granted. I conclude that plaintiff did not engage in any protected activity listed in § 215(a)(3).

From both parties' proposed findings of fact, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

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[1] This case and Kevin Kasten et al. v. Saint-Gobain Performance Plastics Corporation, No. 07-cv-449-bbc (W.D. Wis. filed Aug. 15, 2007), were consolidated on January 29, 2008. On May 13, 2008, the cases were severed in accordance with a stipulation filed by the parties.

Defendant Saint-Gobain Performance Plastics Corporation is a corporation that manufactures a variety of high-performance polymer products. Defendant's principal place of business is in Akron, Ohio; it maintains and operates a manufacturing and production facility in Portage, Wisconsin.

Plaintiff Kevin Kasten worked for defendant at its Portage facility from October 2003 until December 2006. He was an hourly manufacturing and production worker who worked both first and third shifts. He worked as a Fabricator, Mill Room Utility and Setup Utility.

On February 13, 2006, plaintiff received a "Disciplinary Action Warning Notice-Verbal Counseling Warning" from defendant because of several "issues" plaintiff had during January 2006 regarding punching in and out on the Kronos time clocks. (The parties do not submit facts regarding the exact nature of plaintiff's "issues.") The notice stated in part that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued."

On August 31, 2006, plaintiff received a "Disciplinary Action Warning Notice – Step 2 Policy Violation - Written Warning" from defendant, again related to problems punching in and out on the Kronos time clocks. The notice stated in part that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination." On November 10, 2006, plaintiff received a "Disciplinary Action Warning Notice - Step 3 Policy Violation – Written Warning" accompanied by a "One Day Disciplinary Suspension" from defendant for his failure to clock in and out on the Kronos time clocks on October 31, 2006. The notice stated in part that "if the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination."

On December 6, 2006, defendant suspended plaintiff on the ground that he had violated defendant's policy regarding time clock punches for a fourth time. On December 11, 2006, defendant's Human Resources Manager, Dennis Brown, told plaintiff over the phone that defendant had decided to terminate his employment. On December 19, 2006, defendant's Human Resources Generalist, Lani Williams, wrote plaintiff a letter confirming his termination and explaining that plaintiff's termination was in response to his repeated punch in and punch out violations.

On September 12, 2007, plaintiff filed a wage and hour complaint against defendant with the Equal Rights Division of the. Wisconsin Department of Workforce Development alleging that defendant had wrongfully terminated him. On December 5, 2007, plaintiff filed this lawsuit, alleging that defend-ant terminated his employment in violation of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

DISPUTED FACTS

The parties dispute whether plaintiff complained to his supervisors about the legality of the location of defendant's time clocks because the location meant that employees were not being paid for all time spent donning and doffing required protective gear. Some of plaintiff's specific allegations are that: (1) in September or October 2006 he told Dennis Woolverton that he believed the locations of defendant's time clocks were illegal; (2) at a meeting with Lani Williams (whose last name at the time was Wruck) he told her that the location of defendant's time clocks were illegal and that if defendant was challenged in court regarding time clock location "they would lose,"; (3) on three or four occasions during the last few months of 2006 he told April Luther that the locations of defendant's time clocks were illegal; (4) sometime in October 2006 he told Luther that he was thinking of starting a lawsuit about the location of defendant's time clocks; and (5) during the December 6, 2006, meeting regarding plaintiff's suspension, he told Dennis Brown and Mr. Stanford that he believed that the location of defendant's time clocks were illegal and that if defendant was challenged in court regarding time clock location it would lose.

Defendant denies that plaintiff ever told any of his supervisors or any human resources personnel that he believed that the time dock locations were illegal.

OPINION

Plaintiff brought this action against defendant under the Fair Labor Standard Act's anti-retaliation provision. 29 U.S.C. § 215(a)(3). Under that provision:

> it shall be unlawful for any person—
>
> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]

Defendant contends that it is entitled to summary judgment because even if the court were to accept as true plaintiff's proposed facts regarding his oral complaints to his supervisors, plaintiff did not file any complaint and thus, did not engage in any protected activity listed under § 215(a)(3). Conversely, plaintiff contends that his oral complaint to his supervisors served as an assertion of his rights under the FLSA and that such an assertion is a complaint protected by the anti-retaliation provision.

The issue is whether plaintiff's oral complaint is a protected activity under the FLSA anti-retaliation provision's "filed any complaint" language. I conclude that it is not. Although the plain language of § 215(a)(3) appears to delineate which activities trigger the protection of the statute, there is a split among the circuits regarding what form employee complaints must take to be protected under language of the statute. Jennifer Clemons, FLSA Retaliation: A Continuum of Employee Protection, 53 Baylor L. Rev. 535 (2001) (discussing different approaches taken by different circuit courts toward FLSA's anti-retaliation provision). The Court of Appeals for the Seventh Circuit has never addressed the issue directly. See Crowley v. Pace Suburban Bus Division of the Regional Transportation Authority, 938 F.2d 797, 798 n.3 (7th Cir. 1991) (noting that although other circuits had construed anti-retaliation provision broadly to cover activities not listed in language of provision, that issue was not being addressed in case before court); see also Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999) (noting that language in anti-retaliation provision is very broad and that filing claim with state Department of Labor qualified as protected activity, but not discussing what other activities are protected under statute).

The disagreement among courts that have directly addressed the issue generally centers on whether an informal complaint triggers the statute's protection. At one end of the spectrum are the courts that have determined that § 215(a)(3) protects informal complaints under the courts' interpretation of the anti-retaliation provision as protecting any activity by a worker constituting an assertion of an FLSA right, including mere oral complaints to supervisors when the basis for the complaining concerns something regulated by the FLSA. For example, in Love v. RE/MAX of America, 738 F.2d 383, 387 (10 Cir. 1984), the Court of Appeals for the Tenth Circuit interpreted the FLSA's anti-retaliation provision to apply "to the unofficial assertion of rights through complaints at work." In Equal Employment Opportunity Commission v. Romeo Community Schools, 976 F.2d 985, 989 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit relied on Love in determining that the plaintiff's verbal complaint to her employer about being paid lower wages than male employees was a protected activity under the FLSA's anti-retaliation provision.

At the other end of the spectrum are the courts that have interpreted the retaliation provision to protect only the filing of formal complaints with a labor agency or a court. For example, in Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2d Cir. 1993), the Court of Appeals for the Second Circuit determined that an employee's oral complaint to a supervisor about deficient pay was not an activity protected under the "plain and unambiguous" language of the statute because it was not a formal complaint filed with a labor agency or a court. Other courts have fallen in the middle of the spectrum. See, e.g., Valerio v. Putnam Associates Inc., 173 F.3d 35, 44 (1st Cir.

1999) (holding that FLSA's retaliation provision protects employees who "filed a sufficient complaint with an employer"); Lambert v. Ackerly, 180 F.3d 997, 1007 (9th Cir. 1999) (reasoning that although "not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3)[,]" the plaintiffs had clearly filed a complaint because they "not only complained orally to their employers...[but] also contacted the Department of Labor, hired an attorney to assist them with their claim, and notified their employer in writing of the specific FLSA violation they were alleging.").

Plaintiff would have this court follow those that have construed the statute so broadly as to include oral complaints alone as a protected activity, but those courts appear to have simply ignored the statute's use of the word "filed," perhaps because they focused on whether the statute protects informal or formal complaints and on the desire to effectuate the remedial purpose of the statute. See, e.g., Hernandez v. City Wide Insulation of Madison, Inc., 508 F. Supp. 2d 682, 689-90 (E.D. Wis. 2007) (noting that FLSA must be construed broadly as protecting mere oral complaints to effectuate statute's remedial purpose). I agree that the remedial nature of the FLSA justifies a broad interpretation of its provisions. Sapperstein, 188 F.3d at 857. However, the plain language of the statute should not be disregarded. Statutory interpretation begins with "the language of the statute itself [and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Id. (internal quotation omitted). I cannot ignore the explicit language Congress used in writing the statute.

Instead, taking into consideration the statute's explicit language as well as its remedial purpose and the pertinent case law, I believe that a middle-of-the-road approach is best. That path leads to the fallowing conclusion: the FLSA's anti-retaliation provision protects more informal complaints, including those made to employers, so long as they are in writing and are filed. I agree with the contention that the plain language of statute cannot be read to limit protected activity to formal complaints filed with either a labor agency or a court. The language of the statute covers employees that "file[] *any* complaint." 29 U.S.C. § 215(a)(3) (emphasis added). Therefore, complaints filed with an employer are covered under the provision's "any" complaint language.

However, the plain language of § 215(a)(3) requires that the complaint be "filed." Expressing an oral complaint is not the same as filing a complaint. By definition, the word "file" refers to "a collection of papers, records, etc., arranged in convenient order," Random House Webster's College Dictionary 489 (2d ed. 1999), or, when used in verb form as it is in the statute, "[T]o deliver (a paper or instrument) to the proper officer so that it is received by him to be kept on file, or among the records of his office," Webster's New International Dictionary of the English Language 945 (2d ed. 1958). One cannot "file" an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place. An oral complaint can become a filed complaint only if it is committed to document form. Nothing in the plain language of the provision suggests that it would be improper to interpret the use of the word "filed" as requiring that a complaint be more than an oral complaint. See, e.g., Clevinger

v. Motel Sleepers, Inc., 36 F. Supp. 2d 322, 324 (W.D. Va. 1999.) ("The word 'filed' clearly denotes a procedure other than oral."). At a minimum, an employee's complaint must be provided to his employer in some documented form, such as a letter, for the complaint to be considered "filed" and fall under the protection of the FLSA's anti-retaliation provision. (Whether an email would qualify for "filing" is an issue I need not reach in this case.)

By plaintiff's own admission, he did not file a complaint with any person or any agency until eight months after his employment was terminated. If, as he *says,* he complained orally to his superiors, his doing so was not enough to trigger the protection of the FLSA's anti-retaliation provision. Telling his supervisors that he believed that the locations of defendant's time clocks were illegal or even that he was thinking about starting a lawsuit regarding time clock location would not fulfill the requirement of filing a complaint under the FLSA's anti-retaliation provision. At most, plaintiff's oral complaining was "abstract grumbling," Valerio, 173 F.3d at 44, or an "amorphous expression of discontent," Ackerley, 180 F.3d at 1007, regarding the location of defendant's time clocks. Therefore, even accepting all the disputed facts proffered by plaintiff and viewing them in a light most favorable to him, I conclude that he did not engage in a protected activity under § 215(a)(3) and defendant is entitled to summary judgment on plaintiff's FLSA retaliation claim.

ORDER

IT IS ORDERED that:

1. Defendant Saint-Gobain Performance Plastics Corporation's motion for summary

judgment (dkt. #58) is GRANTED.

2. The clerk of court is directed to enter judgment in favor of defendant. Entered this 18th day of June, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEVIN KASTEN and JAMES POOLE
individually and on behalf of other
similarly situated individuals,

OPINION AND ORDER

Plaintiffs,

07-cv-449-bbc[1]

v.

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Defendant.

This is a civil action for monetary relief in which plaintiffs Kevin Kasten and James Poole, individually and on behalf of others similarly situated, contend that defendant Saint-Gobain Performance Plastics Corporation violated the Fair Labor Standards Act, Wisconsin wage statutes and regulations and state common law by not compensating its employees for all "work" time prior to December 11, 2006. Since this lawsuit began, 156 similarly situated individuals have opted into the FLSA collective action. Jurisdiction is present. 28 U.S.C. §§ 1331 and 1367.

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[1] This case and Kevin Kasten v. Saint-Gobain Performance Plastics Corporation, No. 07-cv-686-bbc (W.D. Wis. filed Dec. 5, 2007) were consolidated on January 29, 2008. On May 13, 2008, the cases were severed in accordance with a stipulation filed by the parties.

Currently there are eight motions pending before the court in this case, seven of which will be addressed in this opinion. Plaintiffs have the following three motions pending: (1) motion for partial summary judgment (dkt. #98); (2) motion for Fed. R. Civ. P. 23 class certification (dkt. #107); and (3) Motion to strike Jeffrey Fernandez's expert report (dkt. #168). Defendant has the following four relevant motions pending: (1) motion to decertify plaintiffs' FLSA collective action (dkt. #113); (2) motion for partial summary judgment (dkt. #101); (3) motion to strike plaintiffs' proposed findings of fact numbers 56 and 65 (dkt. #132); and (4) motion to strike portions of plaintiffs' reply brief (dkt. # 192). (Defendant also filed a motion for summary judgment (dkt. #117) with respect to plaintiff Kasten's individual retaliation claim. This motion was filed in case No. 07-cv-449-bbc, but it addresses plaintiff Kasten's retaliation claim in case No. 07-cv-686-bbc. Therefore, I will address that motion in a separate opinion.)

In an attempt to address the vast array of motions in an organized fashion, I have split this opinion into three sections and grouped related motions together in each section. The first section will address the three non-dispositive motions, which are plaintiffs' motion to strike and both of defendant's motions to strike. The second section will address the parties' cross motions for partial summary judgment. The third section will address plaintiffs' motion for class certification and defendant's motion to decertify the collective action.

Regarding the motions in the first section, I conclude that all the parties' motions to strike will be denied. Regarding the motions in the second section, I conclude that plaintiffs' motion for partial summary judgment will be granted as it applies to plaintiffs'

FLSA and Wisconsin labor law claims for overtime and regular pay for donning, doffing and walking to work stations; it will be denied in all other respects. Defendant's motion for partial summary judgment will be denied because the offset defense does not apply under the circumstances of this case. Finally, regarding the motions in the third section, I will deny defendant's motion to decertify plaintiffs' FLSA action because I find that the named plaintiffs and opt-in plaintiffs are similarly situated. Plaintiffs' motion for class certification of their state law claims will be granted as to their statutory claims and denied as to their common law claims.

I. NON-DISPOSITIVE MOTIONS TO STRIKE

A. Plaintiffs' Motion to Strike Jeffrey Fernandez's Expert Report

Plaintiffs contend that defendant's expert Jeffrey Fernandez's expert report regarding the time defendant's employees spend donning, doffing and walking should be stricken from the record and that the court should not rely upon the report's conclusions in its summary judgment determinations because the analysis and conclusions in the report are irrelevant and the methodology and calculations are unreliable. Put more specifically, plaintiffs contend that Fernandez's expert report does not satisfy the requirements regarding the admissibility of an expert report under Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Defendant disputes plaintiffs' criticisms of the report and contends that it is admissible.

Fed. R. Evid. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

It is the duty of a district court to function as a "gatekeeper" regarding expert testimony, which entails determining whether the proposed expert testimony, or the proffered expert report, is both relevant and reliable. Daubert, 509 U.S. at 589. The Court of Appeals for the Seventh Circuit follows a three-step analysis in addressing relevance and reliability:

> [1] the witness must be qualified "as an expert by knowledge, skill, experience, training, or education," Fed. R. Evid. 702; [2] the expert's reasoning or methodology underlying the testimony must be scientifically reliable, Daubert, 509 U.S. at 592-93; and [3] the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid. 702.

Ervin v. Johnson & Johnson, Inc., 492 F.3d 901,904 (7th Cir. 2007). The court of appeals expert testimony.'" Id. (quoting Wintz By & Through Wintz v. Northrop Corp., 110 F.3d 508, 512 (7th Cir. 1997)).

Plaintiffs do not challenge Fernandez's expert qualifications and his résumé clearly supports his knowledge of ergonomics, that is, the relation between workers and their environments. Rather, the core of plaintiffs' argument is that the report is irrelevant because some of the factors used in the report, such as the time period evaluated or the use of a task-based methodology, are legally improper and, therefore, the report's time estimates are inherently incorrect. Plaintiffs' argument misses the mark.

Fernandez's expert report addresses a central issue in this case: what amount of time, if any, plaintiffs were working but not compensated by defendant. His report provides time estimates regarding employee donning, doffing and walking times. The report could help the finder of fact in determining how much time plaintiffs were working without being compensated. Plaintiffs' concerns regarding relevance are actually concerns regarding the content of the report. Such concerns are best addressed through cross examination before the trier of fact. I find the report relevant.

Plaintiffs's second attack on Fernandez's expert report focuses on the reliability of his method and conclusions. In addressing this issue, a district court must "ensure that the testimony is sufficiently reliable to qualify for admission." Mihailovich v. Laatsch, 359 F.3d 892, 918 (7th Cir. 2004) (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999)). The Supreme Court has provided five non-exhaustive and flexible criteria for guidance in addressing reliability:

> whether the theoretical framework or technique underlying the witness's testimony (1) is subject to verification through testing, (2) whether it has been subject to peer review and publication,

> (3) what its known or potential rate of error is, (4) whether there are standards controlling its application, and (5) whether it is generally accepted within the relevant expert community.

Id. (citing Daubert, 509 U.S. at 593-94).

Plaintiffs provide eight reasons why Fernandez's expert report is unreliable. Those include a challenge to the size of the samples Fernandez used as being too small to be statistically significant and Fernandez's alleged error in relying on standardized walking times rather than actual walking times. These challenges do not undermine the reliability of the report sufficiently to preclude its use for summary judgment purposes.

In arguing reliability, plaintiffs make the mistake they made when they argued relevance. Their concerns do not address the reliability but the correctness of the report's conclusions, which are concerns best addressed through cross examination. Fernandez used clear standards in creating the time estimates in his report and he verified his conclusions through transparent testing. Plaintiffs do not disagree with the way Fernandez used the standards or the way he implemented his tests; instead, they disagree with the standards themselves and the tests that were created. Essentially, plaintiffs are arguing that Fernandez tailored his evaluation toward defendant's position regarding the time employees spent donning, doffing and walking. This does not make Fernandez's report unreliable; it merely makes it biased, which, as stated before, is something that goes to the weight to be given his report or testimony and not to its admissibility. Plaintiffs have failed to prove that Fernandez's expert report is not sufficiently reliable to qualify for admission.

Therefore, their motion to strike will be denied.

B. Defendant's Motion to Strike Portions of Plaintiffs' Reply Brief

Defendant requests that portions of plaintiffs' reply brief be stricken because they contain new arguments regarding the reliability and relevance of Fernandez's expert opinions. Plaintiffs made those new arguments in the hope that Fernandez's expert report would be inadmissible. Now that I have determined that Fernandez's expert report is admissible as far as it applies to the pending summary judgment motions, plaintiffs' newly raised arguments carry no weight. Accordingly, defendant's motion to strike portions of plaintiffs' reply brief will be denied.

C. Defendant's Motion to Strike Plaintiffs' Proposed Findings of Fact 56 and 65

Defendant asks the court to strike two of plaintiffs' proposed findings of fact that state:

> 56. The range of time the Plaintiffs reported that they spent donning and doffing pre and post-shift ranged between six and thirty minutes, with an average time of 13.15 to 14.6 minutes. The range of time the Plaintiffs reported that they spent donning and doffing during their lunches ranged between eight and twenty minutes, with average times of 11.25 to 12.5. Hourly paid manufacturing and production workers who were scheduled for 30 minute unpaid meal breaks were not given a full 30 minutes of duty-free time because they were donning and doffing gear during a portion of this time.

> 65. Mr. Brown likewise stated in an October 15, 2006 e-mail to Valerie Atkins from Defendant's payroll department, "Valerie, can you let us know the cost for three Kronos clocks and how to get them here as soon as possible. We need to move this project forward to ensure we are compliant with wage and hour law."

Defendant asks that proposed fact number 56 be stricken because the lay witness opinion testimony that supports the finding of fact are merely "guesstimations" or speculation. It wants proposed fact number 65 stricken because the affidavit supporting the finding of fact has not been properly authenticated.

Plaintiffs' have proffered testimony by lay witnesses regarding the time it took employees to don and doff. This testimony *is* "rationally based on the perception of the witness[es]" as required by Fed. R. Evid. 701(a). Furthermore, the witnesses' opinions are reasonable and "'grounded in observation [and] other first-hand personal experience," *as* opposed to being "'flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.'" Payne v. Pauley, 337 F.3d 767, 772 (7th Cir. 2003) (quoting Visser v. Packer Engineering Assoc., 924 F.2d 655, 659 (7th Cir.1991)). Although the witnesses' testimony is based on their memories and may be inexact, it *is* based on personal knowledge. Defendant's request that proposed fact number 56 be stricken from plaintiffs' proposed findings of fact will be denied.

Defendant is somewhat disingenuous when it asserts that the e-mails that are the basis for plaintiffs' proposed fact number 65 have not been properly authenticated. First, the e-mails were documents produced by defendant during discovery. Second, at his March 10, 2008 deposition, Dennis Brown clearly authenticated the e-mail as being sent by him and also authenticated the contents of the e-mail. (Dkt. #209 at 5-6.) Accordingly, defendant's request to strike plaintiffs' proposed fact number 65 for failure to authenticate will be denied.

II. CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

A. Undisputed Facts

The following facts are undisputed and drawn from both parties' proposed findings of fact.

1. The parties

Defendant Saint-Gobain Performance Plastics Corporation is a corporation that manufactures high-performance polymer products for industrial and commercial application. Defendant's principal place of business is in Akron, Ohio and it maintains and operates a manufacturing and production facility in Portage, Wisconsin.

Named plaintiff Kevin Kasten is an adult resident of Wisconsin. He worked for defendant at its Portage, Wisconsin facility from October 2003 until December 2006. He was an hourly manufacturing and production worker who worked both first and third shifts. He worked as a Fabricator, Mill Room Utility and Setup Utility. Named plaintiff James Poole is also an adult resident of Wisconsin. He worked for defendant at its Portage, Wisconsin facility from March 2005 through May 2007. He was an hourly manufacturing and production worker who worked second shift as a Machine Operator and Lead Operator.

Since August 2007, when named plaintiffs Kasten and Poole brought this lawsuit, approximately 156 former and current Saint-Gobain employees who worked or work at defendant's Portage, Wisconsin facility have opted into the lawsuit under the FLSA's collection action opt-in procedures, 28 U.S.C. § 216(b).

2. Working at defendant's manufacturing and production facility in Portage, Wisconsin

a. The shifts at defendant's Portage facility

Defendant's Portage facility operates continuously seven days a week. To keep the facility in operation, defendant has five shifts: (1) first shift, which begins at 6:30 a.m. and ends at 3:00 p.m., Monday through Friday; (2) second shift, which begins at 2:42 p.m. and ends at 11:12 p.m., Monday through Friday; (3) third shift, which begins at 10:54 p.m. and ends at 6:54 a.m., Monday through Friday; (4) fourth shift, which begins at 10:45 p.m. and ends at 11:15 a.m. on Friday and Saturday; and (5) fifth shift, which begins at 10:45 a.m. and ends at 11:15 p.m. on Saturday and Sunday.

Employees working first and second shifts receive one 30-minute unpaid meal break and two 10-minute paid rest breaks. Employees working third shift receive one 20-minute paid meal break and two 10-minute paid rest breaks. Employees working fourth and fifth shifts receive one 30-minute unpaid meal break and three 10-minute paid rest breaks. Employees working first, second, fourth or fifth shift receive a paid five minutes at the end of their 30-minute unpaid meal breaks to wash hands and don protective gear before returning to work.

b. The working areas and required safety gear at defendant's Portage facility

Defendant's Portage facility is split into four manufacturing areas: (1) the platinum clean rooms; (2) the general manufacturing area, which includes millable injection molding, LIM molding, Barwell mill and transfer molding; (3) extrusion; and (4) "other areas," which include the development center, the hydraulics area, the tool room and shipping. The type of protective gear that defendant's employees are required to wear depends on the area of the facility in which they work.

In the platinum clean rooms employees may work as gland coordinators or gland utilities. Platinum clean rooms workers are required to wear safety shoes, safety glasses, hair covers, beard covers (if the worker has a beard), jump suits, ear plugs and shoe covers, and depending on the work an employee performs on a given day, he or she may also be required to wear gloves and arm guards. The general manufacturing area includes several positions; among them are fabricator, mill operator and house wear coordinator. General manufacturing area workers are required to wear safety shoes, safety glasses, hair covers, beard covers (if the worker has a beard), lab coats, and shoe covers and, depending on the work an employee performs on a given day, he or she may also be required to wear ear plugs, gloves, and arm guards.

Employees working in the extrusion area are labeled extruders. Extruders are required to wear safety shoes, safety glasses, hair covers, beard covers (if the worker has a beard), jump suits, and earplugs and, depending on the work an employee performs on a given day, he or she may also be required to wear gloves. Employees working in the development center are required to wear safety shoes and safety glasses; if such workers are producing items that are intended for delivery to customers, they are required to wear hair covers, beard covers (if the worker has a beard), lab coats, ear plugs, gloves and arm guards. Employees working in the tool room and hydraulics area are required to wear safety shoes and safety glasses.

Except prescription safety glasses, all required gear is washed, disposed of or stored onsite to preserve the integrity of the products and the cleanliness of the workplace. Workers are not permitted to wear their safety shoes outside the facility. Arm guards, fabric smocks and fabric knit gloves remain onsite. Earplugs, hair covers, beard covers, shoe covers and nitrile gloves are disposable items available only onsite and discarded after use.

c. The Kronos system and donning and doffing

All hourly workers, including those hired through temporary employment agencies, are given their own Kronos cards to be used in conjunction with time clock machines so that they can clock-in and clock-out for their shifts and meal breaks. The Kronos system records each worker's work time using the time clock punch times and the shift assigned to each worker. Defendant bases its weekly payroll on each worker's Kronos report.

Workers are trained on donning and doffing procedures and on how to clock-in and out for their shifts. Workers are not required to clock-in or out for their 10-minute rest breaks and it is common for workers to take breaks in excess of 10 minutes. Regarding meal breaks for workers in all shifts but third shift, workers are required to doff their gear, except for safety shoes and glasses, before clocking-out and then don their gear and clock-in before returning to work. If workers choose to leave the building during their meal break they must also doff their safety shoes and glasses before leaving and don them upon returning. The Kronos system automatically deducts one half-hour of time for meal breaks on all shifts, except third shift, regardless of a worker's clock-out and clock-in times. Workers may request supervisor approval for an exception to the automatic deduction if they are performing work during a meal break.

Prior to December 11, 2006, most hourly manufacturing and production workers were required to clock-in after donning some required gear and to clock-out before doffing some required gear. Employees were not paid for some required donning and doffing because time clocks were located past locker rooms and gowning areas. Because of the various location of time clocks and the variation in amounts and types of gear necessary for each work area, the amount of uncompensated time spent donning and doffing varies among workers.

B. Disputed Facts

The parties dispute the amount of time workers spend donning and doffing protective gear. According to plaintiffs, before December 11, 2006, workers spent between six and thirty minutes donning and doffing each day, with an average time of 13.15 to 14.6 minutes. They spent between eight and twenty minutes donning and doffing during meal breaks, with an average time of 11.25 to 12.5 minutes. According to defendant, the median total time workers spent donning and doffing gear each day ranged from 4.117 minutes to 4.755 minutes, depending on the area.

Also, the parties dispute the order that employees do things at the beginning and end of their shifts. Defendant states that workers in the platinum clean rooms generally follow the same chronological sequence before reaching their work stations and upon leaving their work stations:

> (1) Enter building; (2) put outer clothing in locker; (3) replace street shoes with safety shoes; (4) put on safety glasses; (5) proceed to platinum clean room area; (6) clock-in; (7) proceed to gowning area; (8) wash hands; (9) put on hair covers; (10) put on jump suits; (11) put on shoe covers; (12) put in hearing protection; (13) use hand sanitizer; and (14) proceed into platinum clean room.
>
> (1) Leave platinum clean room; (2) enter gowning area; (3) take off shoe covers; (4) take off jump suits; (5) take off hair covers; (6) walk out of gowning area; (7) clock-out; (8) walk to locker room and remove safety shoes and glasses; and (9) exit building.

Plaintiffs state that these chronological sequences are not correct because workers may start their day in one area of the facility and end their day in another. Defendant states that workers in the extrusion area don some gear after clocking in, but plaintiffs contend that extrusion area workers don gear before clocking in.

Defendant states that workers in other areas often followed the same chronological sequence before clocking in and after clocking out:

> (1) Enter building; (2) enter locker room; (3) put

> on safety shoes and glasses; (4) walk to work area; and (5) punch in.
>
> (1) Punch out; (2) walk to locker room; (3) take off safety shoes and glasses; (4) exit locker room; and (5) exit building.

Plaintiffs state that workers in other areas may have to don additional gear depending on the work they would be performing that day and that such additional gear would change the chronological sequence.

Defendant's expert, Jeffrey Fernandez, evaluated defendant's Portage facility and reported on the estimated times workers spend donning, doffing and walking. As part of the evaluation, Fernandez noted how long workers spent on their 10-minute rest breaks. Fernandez concluded that:

> (1) Workers in the general manufacturing area took an average of 3.908 additional minutes for each rest break.
>
> (2) Workers in the platinum clean rooms took an average of 5.908 additional minutes for each rest break.
>
> (3) Workers in the extrusion areas took an average of 4.823 additional minutes for each rest break.
>
> (4) Workers in all three areas took an aggregate of 4.604 additional minutes for each rest break.

Plaintiffs disagree and state that the evaluation is incorrect.

C. Plaintiffs' Motion for Partial Summary Judgment

Under Fed. R. Civ. P. 56, summary judgment is appropriate "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Goldstein v. Fidelity & Guaranty Ins. Underwriters, Inc., 86 F.3d 749, 750 (7th Cir. 1996) (citing Fed. R. Civ. P. 56); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The district judge's function in a summary judgment motion "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. Additionally, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. at 248. Furthermore, all reasonable inferences from undisputed facts should be drawn in favor of the nonmoving party. Baron v. City of Highland Park, 195 F.3d 333, 338 (7th Cir. 1999).

However, the nonmoving party cannot simply rest upon the pleadings once the moving party has made a properly supported motion for summary judgment. Instead the nonmoving party must submit evidence to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Essentially, it becomes the nonmoving party's burden to demonstrate that there is a genuine issue of material fact, that is, that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249.

Plaintiffs request that summary judgment be entered in their favor regarding defendant's liability for all seven causes of action alleged in plaintiffs' complaint. Plaintiffs arrange the seven causes of action into four categories: (1) plaintiffs and similarly situated employees were not compensated for time they spent donning and doffing personal protective gear, in violation of the FLSA and Wisconsin state labor laws; (2) plaintiffs and similarly situated employees were not compensated for donning and doffing, in breach of an express or implied contract; (3) defendant was unjustly enriched by not compensating plaintiffs for time spent donning and doffing; and (4) plaintiffs and similarly situated employees were denied 30-minute meal periods free from work. I will address each of plaintiffs' categories in turn. (Plaintiffs did initially request summary judgment regarding whether defendant's failure to compensate plaintiffs for donning, doffing and walking was willful. Plaintiffs withdrew that request in their reply brief; accordingly, I will not address the issue.)

1. Plaintiffs' FLSA and Wisconsin state labor law claims regarding donning, doffing and walking

The purpose behind the FLSA is to make sure that workers can maintain "the minimum standard of living necessary for health, efficiency, and general well-being." 29 U.S.C. § 202(a). To serve this purpose a core requirement under the FLSA is that "employers must pay their employees a wage for all the 'work' that they do." Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 862 (W.D. Wis. 2007) (citing 29 U.S.C. §§ 206 and 207). Although the FLSA does not define the term "work," a general rule has arisen from the case law "that an employee must be paid for all time spent in physical or mental exertion, whether burdensome or not, controlled and required by the employer, and pursued necessarily and primarily for the benefit of the employer or his business." Sehie v. City of Aurora, 432 F.3d 749, 751 (7th Cir. 2005) (citations and internal quotations omitted). This general rule has been further broadened so that "there need be no exertion at all, and that all hours that the employee is required to give his employer are hours worked, even if they are spent in idleness." Id. (citing Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944)).

An employee who brings an FLSA action for "'unpaid minimum wages or unpaid overtime compensation... has the burden to prove that he performed work for which he was not properly compensated. Adams v. United States, 471 F.3d 1321, 1326 (Fed. Cir. 2006) (alteration in original) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-87 (1946), superseded in part by statute, 29 U.S.C.254). However, this burden is not intended to be "an impossible hurdle for the employee." Mt. Clemens Pottery Co., 328U.S. at 687. When an employer's record of employee work time is inaccurate or inadequate, the employees discharge their burden by (1) proving that in fact they performed work for which they were not properly compensated and (2) producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Id. If the employees satisfy their burden, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Id. at 687-88.

Under Wisconsin's labor laws, an employer "shall as often as monthly pay to every employee engaged in the employer's business...all wages earned by the employee to a day not more than 31 days prior to the date of payment." Wis. Stat. § 109.03(1). Employees are to be paid for hours worked, which is "all time spent in 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer's business.'" Wis. Admin. Code DWD § 272.12(1).

Named plaintiffs contend that their work time includes all the time they and all other opt-in plaintiffs spent donning and doffing the protective gear that defendant required them to wear as well as time spent walking to their work areas and that defendant's failure to compensate them for such time, whether at an overtime rate or at a regular rate, violates the FLSA, 29 U.S.C. §§ 206(a) and 207(1), Wis. Stats. § 109.03(1) and Wis. Admin. Code §§ DWD 272.03 and 274.03. Defendant does not deny that plaintiffs' donning, doffing and walking was time spent working, but instead contends that it does not have to compensate plaintiffs for the time because (1) the uncompensated work time is offset by other time for which plaintiffs were compensated despite not working and (2) the uncompensated work time is de minimis.

a. Defendant's offset defense

Defendant contends that any calculation of uncompensated work time for plaintiffs should be offset by any time for which plaintiffs were compensated but were not working. In support of its contention, defendant points to the paid five minutes it provided plaintiffs at the end of their 30-minute unpaid meal breaks and the extra time it alleges plaintiffs generally took in excess of their paid 10-minute breaks as time periods where plaintiffs were paid for time they did not work. Defendant cites Barefield v. Village of Winnetka, 81 F.3d 704 (7th Cir. 1996), as the cornerstone for its offset argument, but the case is inapposite. The circumstances supporting application of the principle in Barefield are different from the circumstances in this case.

In Barefield, 81 F.3d at 710, the Court of Appeals for the Seventh Circuit determined that the meal periods at issue were not compensable work time under the FLSA. The court went on to reason that because the employer compensated its employees for their meal periods although it was not required to do so under the FLSA, the employer could "properly offset the meal break against the compensable roll call time worked by [its employees]." Id. In other words, when an employer pays an employee for time not otherwise compensable under the FLSA, the employer is entitled to an offset for compensation due under the statute.

The reasoning of Barefield is inapplicable in this case because defendant has not compensated plaintiffs for time not otherwise compensable under the FLSA. Plaintiffs use the paid five minutes provided at the end of meal periods to don protective gear and to sanitize as required by defendant, which makes the time compensable work time under the FLSA. Defendant does not contend otherwise.

Furthermore, the additional minutes taken outside defendant's provided 10-minute rest breaks should be considered compensable work time under the FLSA. Five to twenty minute rest breaks must be considered hours worked, 29 C.F.R. § 785.18, and "[u]nder the [FLSA] an employee must be compensated for *all* hours worked... [which] is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness," 29 C.F.R. § 778.223 (emphasis added). The principles in the two regulations support the conclusion that the "additional" break time is compensable work time.

Defendant is entitled to take disciplinary measures against employees who take excessively long breaks, but it cannot be permitted to offset such time against uncompensated work time in its attempt to satisfy the requirements placed on it under the FLSA. "[I]t would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation *required* by the FLSA." Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 914 (9th Cir. 2004) (emphasis added).

Defendant's offset defense fails as a matter of law. The undisputed facts establish that defendant has not paid plaintiffs for any time not otherwise compensable under the FLSA.

b. Defendant's de minimis defense

As plaintiffs correctly point out, "[t]he 'de minimis' exception has no statutory basis and [Anderson v. Mt. Clemens Pottery Co.] is the only case in which the Supreme Court considered the exception's application." Spoerle, 527 F. Supp. 2d at 868. Moreover, the case from the Court of Appeals for the Seventh Circuit that addresses the de minimis exception, Frank v. Wilson & Co., 172 F.2d 712 (7th Cir. 1949), does not support defendant's argument. In Frank, the court does not help flesh out the application of the exception, the court said only that "no rigid rules can be laid down with mathematical certainty as to when the de minimis rule applies." Frank, 172 F.2d at 716.

The core purpose of the FLSA is to insure that employers pay their employees for all hours worked. Spoerle, 527 F. Supp. 2d at 862 (citing 29 U.S.C. §§ 206 and 207); see also 29 C.F.R. § 778.223. Allowing an employer not to pay an employee merely because the amount of time worked is de minimis conflicts directly with that core purpose. To trigger the de minimis exception, an employer must show not merely that the time involved is minimal but that it would be difficult to measure the time in light of the realities of the industrial world. Spoerle, 527 F. Supp. 2d at 869. In other words, "when providing compensation for a task imposes no additional burden on the employer, there is no justification for denying the employee compensation for that task, regardless how fast the task was performed." Id.

The parties dispute the amount of uncompensated work time. However, even accepting defendant's estimate of 4.117 minutes to 4.755 minutes spent donning, doffing and walking, the amount of time does not fall under the de minimis exception. Defendant does not contend that it would be an administrative burden to record and compensate plaintiffs' donning, doffing and walking times. In fact, defendant notes that "[w]ith today's technology, one could argue that all time can be recorded to the minute," which could effectively eliminate the de minimis exception. (Def.'s Br. in Opp'n to Pls.' Mot. for Summ. J., dkt. #157 at 21.) (This may prove true, especially when one considers that the de minim is exception was created within the context of 1940's technology.) Instead, defendant contends that it is an "industrial reality" that employees will take advantage of paid, unsupervised time on the clock by stretching out their donning and doffing time or, to use defendant's terminology, will "game the system." According to defendant, employers cannot be expected to compensate employees for all donning, doffing and walking time without rewarding employees for inefficiency.

Defendant's concern over the "industrial reality" that employees will "game the system" applies equally to any circumstance in which employees use a time clock to keep track of time at work. The solution is not to violate the FLSA, but to set limitations on the amount of time employees may take to don and doff required protective gear. Because defendant has admitted that it would incur no additional administrative burden in compensating plaintiffs for time spent donning, doffing and walking, its de minimis defense fails as a matter of law.

c. Disputed facts

Defendant's last effort to defeat plaintiffs' request for summary judgment on their FLSA and Wisconsin labor law claims is its contention that genuine issues of material fact preclude summary judgment. Defendant points to the parties' dispute regarding the amount of time plaintiffs spent donning, doffing and walking as a genuine issue of material fact that should be decided by a jury. Defendant is correct that a jury must resolve these factual disputes but that is a decision regarding damages and not liability.

The undisputed facts show that defendant engaged in the practice of not compensating plaintiffs for time spent donning and doffing certain required protective gear and walking to work areas. There may be variances in the damages due plaintiffs depending on the: area in which they worked and the protective gear required for that area, those variances do not change the fact that defendant violated the FLSA and Wisconsin labor law by not compensating plaintiffs for all hours worked. The undisputed facts establish that defendant's offset and de minimis defenses fail as a matter of law and defendant has not asserted any separate defenses in opposition to plaintiffs' Wisconsin labor law claims. Therefore, plaintiffs have satisfied their burden of proving the absence of genuine issues of material fact regarding defendant's liability for plaintiffs' first three claims in their complaint, that is, plaintiffs' claims that defendant violated the FLSA and Wisconsin labor law by not compensating plaintiffs for all hours worked.

2. Plaintiffs' breach of contract claim

Plaintiffs' breach of contract claim rests on their contention that plaintiffs and similarly situated employees were not compensated for donning and doffing, in breach of an express or implied contract with defendant. However, plaintiffs proposed no facts to support a finding of any express or implied contract between plaintiffs and defendant. Because genuine issues of material fact remain regarding plaintiffs' breach of contract claim, I will deny summary judgment on it.

3. Plaintiffs' unjust enrichment and quantum meruit claims.

As with their breach of contract claim, plaintiffs have proposed no facts regarding reasonable compensation or the benefit they provided defendant by donning and doffing that would support their unjust enrichment and quantum meruit claims. A finding that donning and doffing is "work" under the FLSA and Wisconsin labor law does not require a finding that donning and doffing is a benefit to which defendant was not entitled to without having to pay for it. Because genuine issues of material fact remain regarding plaintiffs' unjust enrichment and quantum meruit claims, I will deny summary judgment on those claims. (Moreover, it is questionable whether plaintiffs can continue to proceed on their equitable common law claims after having succeeded on their statutory claims. See, e.g., In re Estate of Ruediger, 83 Wis. 2d 109, 121, 264 N.W.2d 604, 610 (1978) ("Ordinarily, an aggrieved party must resort to a statutory remedy which was designed to redress a particular injury rather than to common law remedies."). However, defendant did not move for summary judgment on that issue and I will not address it now.)

4. Plaintiffs' claim for not being paid for "on duty" meal periods

Plaintiffs contend that they were not paid for "on duty" meal periods as required under Wisconsin Administrative Code DWD § 272.04(1)(c) because they were not paid for donning and doffing before and after meal breaks. According to plaintiffs, such donning and doffing takes between 11.25 minutes and 12.5 minutes. Defendant disputes plaintiffs' contention, noting it provides plaintiffs with a five-minute "wash up" period after their meal breaks. Defendant disputes plaintiffs' assertion that it takes 11.25 minutes and 12.5 minutes to don and doff during meal breaks. On the question whether the five-minute "wash up" period gives plaintiffs enough time to don and doff and still have 30 minutes for a meal period free from work, defendant has raised genuine issues of material fact. Therefore, plaintiff's will not be granted summary judgment on their claim for pay for on duty meal periods.

I conclude that plaintiffs are entitled to summary judgment on their claims that defendant violated the FLSA and Wisconsin labor law when it failed to compensate plaintiffs for time spent donning, doffing and walking to their work areas (plaintiffs' first three claims in their complaint). I conclude further that plaintiffs are not entitled to summary judgment on their state common law claims and meal period claim (claims four through seven in their complaint).

D. Defendant's Motion for Partial Summary Judgment

Defendant requests that the court hold as a matter of law that any work time for which plaintiffs were not compensated be offset against time for which plaintiffs were compensated but were not working. This is essentially a request that the court rule that defendant's offset defense, addressed in section C.1.a. *supra,* be applied to defeat plaintiffs' claims. Because I have already determined as a matter of law that the offset defense fails under the circumstances of this case, defendant's motion for partial summary judgment will be denied.

III. DECERTIFICATION OF COLLECTIVE ACTION AND CLASS CERTIFICATION

A. Defendant's Motion to Decertify Plaintiffs' FLSA Collective Action

On January 17, 2008, Judge Shabaz granted plaintiffs' motion to conditionally certify plaintiffs' FLSA claims as a collective action. That conditional certification was the firs step in a two-step process regarding FLSA collective actions. Austin v. Cuna Mutual Insurance Society, 232 F.R.D. 601, 605 (W.D.

Wis. 2006). Defendant's motion to decertify plaintiffs' collective action is the second step, which involves determining whether the individuals who chose to opt in to the FLSA action are "similarly situated." Id. Although the statute does not define "similarly situated," I have held previously that the inquiry substantially resembles the typicality inquiry associated with class actions under Fed. R. Civ. P. 23. Spoerle v. Kraft Foods Global, Inc., No. 07-cv-300-bbc, 2008 WL 2002221, at *5-*7 (W.D. Wis. May 6, 2008).

Defendant contends that named plaintiffs and opt-in plaintiffs are not similarly situated because they have not proved that they were subject to a general policy or practice that violated the FLSA. This contention appears somewhat disingenuous. Defendant does not deny that all plaintiffs were not compensated for time spent donning and doffing required protective gear and walking to work areas. Although the amount of time and gear varies among plaintiffs, the variations do not negate the existence of a practice of not compensating employees for donning, doffing and walking, and challenging such a practice supports a finding that plaintiffs are similarly situated. Spoerle, 2008 WL 2002221, at *6.

Defendant next directs the court's attention to the variation in work areas and required protective gear at the Portage facility. Defendant contends that the variations demonstrate that plaintiffs are not similarly situated because they affect the application of its de minimis defense. As explained earlier, defendant's de minimis defense fails regardless of the variations in time spent donning and doffing because the undisputed facts establish that defendant would not suffer any additional administrative burden in compensating plaintiffs for such time.

Regardless whether plaintiffs work in different areas, on different shifts and don and doff different amounts of required protective gear, they were subject to defendant's general practice of not compensating employees for donning and doffing certain protective gear and walking to work areas, in violation of the FLSA. Spoerle, 2008 WL 2002221, at *6 (explaining that differences among plaintiffs in pieces of equipment used, distances walked and time spent donning and doffing do not make plaintiffs dissimilar because lawfulness of defendant's policy not contingent on the differences). As another district court has recently noted, "[i]f one zooms in close enough on anything, differences will abound[.]" Frank v. Gold'n Plump Poultry, Inc., No. 04-cv-1028 (PJS/RLE), 2007 WL 2780504, at *4 (D. Minn. Sept. 24, 2007).

Finally, I am aware that the variations among plaintiffs' donning and doffing times will affect damages determinations. Even plaintiffs concede as much. These variations may require creating subgroups to address damages in a more efficient manner. However, those variations do not change my conclusion that plaintiffs are similarly situated in regards to their FLSA claims. Therefore, defendant's motion to decertify plaintiffs' collective action will be denied.

B. Plaintiffs' Motion for Fed. R. Civ. P. 23 Class Certification of State Law Claims

Plaintiffs request that the court certify a Rule 23 class regarding all their state law claims, which includes their common law claims. Typically requests for class certification are made before motions for summary judgment, see, e.g., Wiesmeuller v. Kosobucki, 513 F.3d 784, 787 (7th Cir. 2008), but plaintiffs made their class certification request at the same time as they filed their summary judgment motion. Accordingly, I will address plaintiffs' request in this opinion.

Before engaging in the Rule 23 analysis, defendant raises the argument that a Rule 23 class action on state labor law claims should not proceed alongside an FLSA collection action because Congress created the FLSA's collective action provision to avoid Rule 23 class actions. The argument is an interesting one, but ultimately unpersuasive. The issues are the same for both sets of claims and the validity of the same general practice is being challenged in both sets of claims. The similarities weigh in favor of addressing the claims together, rather than make plaintiffs bring a separate state law class action. Although some other courts have decided otherwise, nothing in the statute prohibits a Rule 23 class action from proceeding alongside an FLSA collective action. See, e.g., Harper v. Yale International Insurance Agency, Inc., No. 03-C-3789, 2004 WL 1080193, at *4 (N.D. Ill. May 12, 2004) (citing different courts that have permitted class action to proceed along with collective action and courts that have not); Musch v. Domtar Industries, Inc., No. 07-cv-524-jcs, (W.D. Wis. Jan. 30, 2008) (Shabaz, J.) (order granting leave to proceed on FLSA collective action together with Rule 23 class certification). Because of the similarities among the claims in this case, I find it appropriate to permit plaintiffs to pursue in one lawsuit their state labor law claims with a Rule 23 class and their FLSA claim with a collective action.

In addressing plaintiffs' request for class certification, I note at the outset that I am required to conduct a "rigorous analysis" of plaintiffs' request to determine whether the requirements under Rule 23 are satisfied in an effort to "protect[] absent class members whose rights may be affected by the class certification." Davis v. Hutchins, 321 F.3d 641, 649 (7th Cir. 2003). Under Fed. R. Civ. P. 23, district courts maintain broad discretion in determining whether certification of a class action lawsuit is appropriate. Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998) (citation omitted). "[P]lantiff has the burden of proving that a case is appropriately a class action and meets all the requirements of Rule 23." Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976) (citation omitted).

Before addressing the express requirements under Rule 23, courts have addressed two implicit ones. Blihovde v. St. Croix, 219 F.R.D. 607, 614 (W.D. Wis. 2003). First, the proposed class definition must be definite, that is, ascertainable, precise and objective. Id. (citation omitted); see also Alliance To End Repression v. Rochford, 565 F.2d 975, 977-78 (7th Cir. 1977). Second, named plaintiffs "must be members of the class they propose to represent." Bilhovde, at 614. (citation omitted). The express requirements under Rule 23 begin with the four listed under Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Next, the party requesting certification must satisfy one of the requirements under Rule 23(b). Pertinent to this case is Rule 23(b)(3), which requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." If the party seeking class certification fails to satisfy any requirement under Rule 23, the court should not grant class certification.

I. Implicit requirements

> Plaintiffs' proposed class definition is:
>
> All hourly-paid individuals who performed manufacturing and/or production work at Defendant's Portage, Wisconsin facility during any time between August 14, 2001 and December 11, 2006.

Plaintiffs have provided this single class definition to cover all asserted state statutory and common law claims. However, as plaintiffs have pointed out, their state statutory claims are subject to a two-year statute of limitation whereas their common law claims are subject to a six-year statute of limitation. The different limitations means that some class members could be barred from bringing the statutory claims as a matter of law. Therefore, under Fed. R. Civ. P. 23(c)(5) it would be more appropriate and provide a more precise class definition to create two classes, one for plaintiffs' statutory claims and one for plaintiffs' common law claims.

Moreover, although defendant does not challenge the definiteness of plaintiffs' proposed class, the court has its own duty to conduct its own rigorous analysis to protect absent class members. Plaintiffs' proposed class is imprecise: it encompasses all hourly paid manufacturing or production workers, without specifying whether those employees are involved in donning, doffing and walking, which are limitations on those who could be potential class members. Therefore, to make sure that plaintiffs' classes are not overly broad, the class definition should include additional language relating to pay for donning, doffing and walking.

The definiteness problems can be easily remedied without denying certification. I will amend plaintiffs' proposed class definition by creating two classes and adding the following language:

> (1) State Statutory Claims Class: All hourly-paid individuals who performed manufacturing and/or production work at defendant Saint-Gobain's Portage, Wisconsin facility during any time between December 11, 2004 and December 11, 2006 and who were not paid regular or overtime pay for time spent donning and doffing required protective gear and walking to and from their work stations.
>
> (2) State Common Law Claims Class: All hourly-paid individuals who performed manufacturing and/or production work at defendant Saint-Gobain's Portage, Wisconsin facility during any time between August 15, 2001 and December 11, 2006 and who were not paid for donning and doffing protective gear that defendant required them to wear.

As for the second implicit requirement, plaintiffs Kasten and Poole appear to fall within class membership by having worked during the relevant time periods and not being paid for donning, doffing and walking. Therefore, plaintiffs have satisfied the two implicit requirements.

I conclude that it would be appropriate to create two classes for plaintiffs' state law claims. Next, I must analyze each class separately under Rule 23.

2. State statutory claims class

a. Express requirements under Rule 23(a)

(l) Numerosity

According to plaintiffs, the state statutory claims class could include up to 700 potential class members if one takes into account the number of hourly-paid maintenance and production employees defendant has employed over the years. Although named plaintiffs fail to provide an exact number, to date 156 other potential class members have opted into the FLSA portion of this case. With the possibility of this many class members, joinder of all members would be impracticable. Accordingly, I find the numerosity requirement satisfied.

(2) Commonality

Generally, "[a] common nucleus of operative fact[s]" satisfies the commonality requirement under Rule 23(a)(2). Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992) (citation omitted). Here, the common nucleus of operative facts is that defendant did not compensate its hourly-paid maintenance and production employees for time spent donning, doffing and walking to working stations. The common issue of law is whether defendant's failure to provide such compensation violates Wisconsin labor law. This is sufficient to satisfy the commonality requirement.

(3) Typicality

The typicality requirement under Rule 23(a)(3) "is closely related to the preceding question of commonality." Rosario, 963 F.2d at 1018. Both the commonality and typicality requirements "ensure that only those plaintiffs... who can advance the same factual and legal arguments may be grouped together as a class." Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). However, under the typicality requirement the focus is on whether the representative plaintiff's claim is based on the same legal theory and arises from the same course of conduct that gives rise to the claims of the other members of the proposed class. Rosario, 963 F.2d at 1018 (citing De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)).

Plaintiffs Kasten and Poole contend that defendant's practice of not paying them for time spent donning, doffing and walking to their work stations violated Wisconsin labor law because such time was time spent working for which they should have been paid. This claim relies on the same legal theory, a violation of Wisconsin labor law, and arises out of the same course of conduct, defendant's general pay practice, as other potential class members' claims. Moreover, the typicality requirement mirrors the similarly situated requirement under the FLSA. The reasons that support a finding that plaintiffs are similarly situated supports a finding of typicality.

(4) Adequacy of representation

There are two parts in determining the adequacy of representation: (1) "'the adequacy of the named plaintiff's counsel[;]'" and (2) "'the adequacy of representation provided in protecting the different, separate, and distinct interest[s]' of the class members." Retired Chicago Police Association v. Chicago, 7 F.3d 584, 598 (7th Cir. 1993) (quoting

Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986)(en banc)). If the class members have "antagonistic or conflicting claims," there is not adequate representation. Rosario, 963 F.2d at 1018 (citation omitted).

Defendant does not point to any antagonistic or conflicting claims among class members. Plaintiffs have suffered the same injury as potential class members, that is, all were uncompensated for donning, doffing and walking to work stations. I find no antagonistic or conflicting claims. In fact, plaintiffs' FLSA claims mirror the state statutory claims in effect, supporting the view that there are no conflicts.

In considering the adequacy of named plaintiffs' lawyers, I look to the factors under Fed. R. Civ. P. 23(g) for guidance. Under those factors, plaintiffs' lawyers are clearly adequate. Plaintiffs' victory on their motion for partial summary judgment demonstrates their lawyers' ability to identify and investigate potential claims as well as their knowledge of the applicable law. Furthermore, both of the firms representing plaintiffs, Nichols, Kaster & Anderson, PLLP and Fox & Fox, S.C., submitted affidavits in which the affiants averred that they specialize in wage and hour class and collective action litigation. Both appear to have the resources to provide representation to the entire class. Therefore, the adequacy of representation requirement is satisfied.

b. Rule 23(b)(3) requirements

Fed. R. Civ. P. 23(b)(3) sets out two additional requirements for class certification, which are often referred to as the predominance and superiority requirements. Rule 23 (b) (3) also provides a non-exhaustive list of four factors to be considered when addressing the predominance and superiority requirements. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-24 (1997). A court should consider

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Furthermore, the- predominance and superiority requirements are meant "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Windsor, 521 U.S. at 615 (alteration in original) (quoting Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966)).

(1) Predominance

Under Rule 23(b)(3), a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Although similar to the commonality requirement under 23(a)(2), the predominance requirement is more demanding. Windsor, 521 U.S. at 623-24. Furthermore, the predominance requirement is meant to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. at 623.

In this case, questions of law and fact common to class members predominate over any questions affecting only individual members. As mentioned previously, when a class of employees are attacking the validity of an employer policy or practice, "the validity of that policy predominates over individual issues and class certification is appropriate." Blihovde, 219 F.R.D. at 620 (citations omitted). Like the FLSA claims, the Wisconsin labor law claims address the validity of defendant's practice of not compensating employees for donning, doffing and walking to work stations. Because the validity of that practice clearly predominates over any variations in the time spent donning, doffing and walking among class members, plaintiffs have satisfied the predominance requirement.

(2) Superiority

Defendant contends that addressing plaintiffs' Wisconsin statutory claims as a class action is not the superior method to address the claims because of the likely difficulties in managing such a class action. Once again, defendant points to the differences among class members in time spent donning, doffing and walking as well as variations in gear donned and doffed. However, it is clear that a class action is the superior method for addressing the validity of a practice that affects hundreds of people. Defendant's concerns about variations in damages can be addressed in two ways: (l) later altering or amending the class under Rule 23 (c)(l)(C); or (2) having sub-classes created and determining a proper course of proceedings to prevent undue complication in addressing damages, in accordance with Rule 23(c)(5) and (d)(I)(A). Therefore, the superiority requirement is satisfied.

3. State common law claims class

Because plaintiffs' failure to satisfy any requirement under Rule 23 supports denying class certification and the purpose of Rule 23 is to achieve economies of time and effort, I have decided to save time and effort by starting the analysis with the Rule 23 requirement plaintiffs fail to satisfy, which is the Rule 23(b)(3) predominance requirement. This is the point at which defendant's often expressed concern about the variation of facts among class members finds a target at last. Although the validity of defendant's general pay practice predominates over other issues regarding plaintiffs' Wisconsin labor law claims, the same cannot be said for plaintiffs' common law claims. Whether defendant's policy was valid makes no difference to the questions whether class members had an express or implied contract with defendant or whether their donning and doffing time benefited defendant.

Although it is plaintiffs' burden to satisfy all Rule 23 requirements, plaintiffs failed to explain why a breach of one class member's contract will necessarily be a breach of another class member's contract. Moreover, the common law claims are subject to defenses, such as laches, the determination of which would require an inquiry into each class member's individual circumstances. Having to address individual issues and defenses to determine the common law claims would not achieve economies of time, effort, and expense or promote uniformity of decision. Therefore, plaintiffs' request for class certification regarding their state common law claims will be denied for failure to satisfy the predominance requirement under Rule 23(b)(3).

3. Conclusion on class certification

Plaintiffs' motion for class certification of their state law claims will be granted with respect to plaintiffs' Wisconsin statutory labor law claims; it will be denied with respect to plaintiffs' state common law claims. In accordance with Fed. R. Civ. P. 23(c)(l)(B), the following definitions will govern:

> ______(l) Class definition: All hourly-paid individuals who performed manufacturing and/or production work at defendant Saint-Gobain's Portage, Wisconsin facility during any time between December 11, 2004 and December 11, 2006 and who were not paid regular or overtime pay for time spent donning and doffing required protective gear and walking to and from their work stations.
>
> (2) Class claims: Claims two, three and four in plaintiffs' complaint.
>
> (3) Class counsel: The law firm of Nichols, Kaster &Anderson, PLLP, through its lawyers James Kaster, Jessica Clay, Sarah Fleegel and Adrianna Haugen, and the law firm of Fox & Fox, S.C., through its lawyers Michael Fox and Randall Gold.

Finally, the changes in plaintiffs' class definition as well as the changes in which claims plaintiffs may pursue as a class require plaintiffs to submit a new form of notice for court approval. The notice should comply with the requirements set out in Fed. R. Civ.

P. 23 (c) (2) (B). Plaintiffs will have until noon on June 6, 2008, to submit their proposed notice for court approval.

ORDER

IT IS ORDERED that:

1. The motion to strike Jeffrey Fernandez's expert report (dkt. #168) filed by plaintiffs Kevin Kasten and James Poole is DENIED.

2. Defendant Saint-Gobain Performance Plastics Corporations' motion to strike plaintiffs' proposed findings of fact numbers 56 and 65 (dkt. # 132) and its motion to strike portions of plaintiffs' reply brief (dkt. #192) are DENIED.

3. Plaintiffs' motion for partial summary judgment (dkt. #98) is GRANTED in part with respect to the issue of defendant's liability for violating the FLSA and Wisconsin labor law and DENIED in part with respect to the issue of defendant's liability for plaintiffs' common law claims and plaintiffs' claim under Wis. Admin. Code § DWD 272.04(l).

4. Defendant's motion for partial summary judgment (dkt. #101) is DENIED.

5. Plaintiffs' motion for class certification (dkt. #107) is GRANTED with respect to their Wisconsin statutory labor law claims, with the amended class definition provided in this opinion; and the motion is DENIED with respect to their common law claims.

6. No later than noon on June 6, 2008 plaintiffs are to submit for court approval their proposed class notice.

7. Defendant's motion to decertify plaintiffs' FLSA collective action is DENIED.

Entered this 2nd day of June, 2008.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

The
American
Heritage Dictionary
of the English Language

FOURTH EDITION

HOUGHTON MIFFLIN COMPANY
Boston New York

* * *

> **files** *–tr.* ... **3.** To send or submit (copy) to a newspaper. **4.** To carry out the first stage of (a lawsuit, for example): *filed charges against my associate.* ...

* * *

75th Congress HOUSE OF REPRESENTATIVES
3d Session Report No. 2738

FAIR LABOR STANDARDS ACT OF 1938

June 11, 1938--Ordered to be printed

Mrs.. Norton, from the Committee on Labor; submitted the following

CONFERENCE REPORT

[To accompany S. 2475]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2475) to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

That this Act maybe cited as the "Fair Labor Standards Act of 1938"

FINDING AND DECLARATION OF POLICY

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods far commerce, of labor conditions detrimental to the maintenance of the minimum standard of -living necessary for health, efficiency, and, general well-being of workers (1) causes *commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in Commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.*

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

* * *

...messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length o service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person-

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision, of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior *to the removal of the goods from such place of employment,*

shall be prima facie evidence that such employee was engaged the production of such goods.

PENALTIES

Sec. 16. (a) Any person who violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more $10,000, or to imprisonment for not more than six months or, both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * *

EXEMPTIONS

Section 11 of the House amendment contains the exemptions from its previsions. Exemptions were made in the Senate bill by the device of excluding the individuals to be exempted from the definition of "employee". The wage-and-hour provisions are not to apply to—,

(1) Any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Secretary);

(2) Any employee employed as a seaman;

(3) Any air-transport employee subject to provisions of title II of the Railway Labor Act;

(4) Any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work, and including employment in the loading, unloading, or

packing of such products for shipment, or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof.

(5) Any employee employed in agriculture; or

(6) Any employee to the extent that such employee is exempted by regulations or Orders of the Secretary issued under section 12 (relating to partial exemptions for learners, apprentices, and handicapped workers) or to weekly or semiweekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published.

The hour provisions of the act are not to apply to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935, or to any employee of an employer subject to part I of the Interstate Commerce Act.

The child-labor provisions are not to apply to any employee employed in agriculture, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

Section 12 of the House amendment requires the Secretary to the extent necessary in order to prevent curtailment of opportunities for employment, by regulation or by order to provide for (1) the employment of learners, and of apprentices under special certificates as issued pursuant to regulations of the Secretary, at such wages lower than the applicable minimum and subject to such limitations as to time, number proportion, and length of service as the Secretary shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates to be issued by the Secretary, at such wages lower than the applicable minimum and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

Section 13 of the House amendment makes it unlawful for any person-

(1) To violate any of the wage or hour provisions; or any of the provisions of any regulation or order of the Secretary issued under section 12 (relating to learners, apprentices, and handicapped workers);

(2) To transport, offer for transportation ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of the wage or hour provisions, or in violation of any regulation or order of the Secretary issued under section 12. No provision of the amendment is to impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision is to excuse any common carrier from its obligation to accept such goods for transportation;

(3) To willfully discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the act, or has testified or is about to testify in any such proceeding;

(4) To violate any of the child labor provisions; or

(5) To violate any of the provisions relating to the requirements of keeping records and making reports there from, or to make any statement, report, or record filed or kept pursuant to such provisions, knowing such statement, report, or record to be false in a material respect.

For the purpose of the prohibition relating to transportation in commerce of goods produced in violation of the amendment, proof that any employee was employed in violation of the wages or hours provision, or in violation of any regulation or order of the Secretary under section 12 (relating to learners, apprentices, and handicapped workers) in any place of employment where: goods were produced, within 90 days prior to the removal of the goods therefrom, is to be prima facie evidence that the goods were produced by such employee.

PENALTIES

Section 14 of the House amendment provides that any person who violates any of the provisions of section 13 shall, upon convict on, be subject to a fine of not more than $500, or to imprisonment for not more than 6 months, or both.

INJUNCTION PROCEEDINGS

Section 15 of the House amendment vests the district courts of the United States and the United States courts of the Territories with jurisdiction to restrain violations of section 13.

RELATION TO OTHER LAWS

Section 16 of the House amendment provides that no provision of the act is to justify noncompliance with any other Federal or State law or municipal ordinance establishing a higher minimum wage or a shorter maximum workday or workweek than that established under the act, and that no provision of the act relating to the employment of child labor is to justify noncompliance with any Federal, State, or Municipal ordinance establishing a higher standard than the standard established under the act.

FAIR LABOR STANDARDS AMENDMENTS OF 1977

HEARINGS
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE
NINETY-FIFTH CONGRESS

FIRST SESSION
ON

S. 1871

TO AMEND THE FAIR LABOR STANDARDS ACT OF 1938 TO INCREASE THE MINIMUM WAGE RATE UNDER THAT ACT, TO PROVIDE FOR AN AUTOMATIC ADJUSTMENT IN SUCH WAGE RATE, AND TO ADJUST THE CREDIT AGAINST THE MINIMUM WAGE WHICH IS BASED ON TIPS RECEIVED TIPPED EMPLOYEES

AND RELATED BILLS

JULY 28; AUGUST 1, 2, 3, 4, AND 5, 1977

Printed for the use of the Committee on Human Resources

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...of indexing and its effect on the economy. The report of the Secretary Labor would of course, continue its review of the employment effects of minimum wage increases as they occur.

I would also like to way discuss two other issues which I believe are of interest.

One issue that seems to surface every time the minimum wage is discussed is a youth subminimum. As I mentioned earlier, I am very concerned about the high unemployment rate among young people. That is why I consider the Youth Employment and Demonstration and Projects Act to be such a landmark piece of legislation.

Nonetheless, I vigorously oppose any effort to deal with this problem by establishing a lower minimum wage for youth. The arguments against such a youth differential are compelling. I fear that any youth differential would encourage employers to lay off adults with families support and replace them with young people at lower wages. Not only would this not solve our basic unemployment problems, but such an approach would also create a host of new problems. I do not believe in trading off adult unemployment for youth unemployment.

Moreover, a young subminimum wage would run counter to the thrust of the Fair Labor Standards Act. This act calk for a basic minimum wage consistent with a minimum standard of living for all workers. My view is that the best way to attack youth unemployment is through comprehensive measures: like the recently passed youth bill. We believe that the combination of public service jobs and work experience programs in this bill are the best way to combat this serious problem.

Another issue involves workers who derive a portion of their income from tips. Tipped employees are a group with a unique pay structure which involves compensation that combines wages and tips. Under existing law, tips, received by these employees. may be counted as wages for up to 50 percent of the requited minimum wage.

Your bill would phase out this tip credit by1983. The House bill would gradually reduce the maximum allowance for tips to $1 an hour beginning January 1, 1981. Our position these provisions is based on two factors. One is the lack of information about whether this change would actually result in an increase in combined and tip earnings. I reduction in percentage terms of the tip may induce some employers to replace tips with a service charge. This could lower the combined wages and tips of these employees.

The other problem is the substantial additional cost to employers of tipped workers, particularly in the restaurant, hotel, and motel industries. Taking into account the proposed new minimum-wage levels we estimate that these increased costs will millions of dollars. Our figures project a cost of $65 million in 1978 million in 1979, $172 million in 1980, and $185 million in the fourth year after the effective date As result, we oppose any change in current law.

One final point. The Fair Labor Standards Act makes it illegal for an employer to discharge or otherwise discriminate against an employee who files a complaint or participate in a proceeding under this act. This act does not, however, authorize the employee to institute any legal action to protect this right, although he does have the authority to sue for unpaid wages. As a result, the only avenue open to a wrongfully discharged employee is to persuade the Department of Labor to file suit in his behalf. This arrangement places a heavy burden on the Department of Labor's resources. It also leaves the employee without a remedy in. those cases where the Department decides not to sue.

An amendment giving these employees the right to file suit in their own behalf would allow employees to pursue their own legal rights. It would also relieve the Labor Department of some of its enforcement burden in this area.

In closing, Mr. Chairman, I would like to say a word about the need to move this important legislation toward passage. Like all compromises this proposal will not fully satisfy everybody. But we that it is an equitable way to deal with the problem of a depressed minimum wage level. Further delay in passing this legislation would only compound the serious problems of low income workers. That is why

I urge you to move quickly to bring equity to the workers at the low end of the income scale.

I want to assure you of the commitment of this administration to making needed improvements in the Fair Labor Standards Act. And, I look forward to assisting you as you proceed toward passage of this important legislation.

Thank you, Mr. Chairman. I will be happy to try to respond to your questions..

The CHAIRMAN: Excellent statement, as usual.

Secretary MARSHALL: Thank you

The CHAIRMAN: I have just a. feeling—with regard to your last point, Mr. Secretary, which I gather here we have not considered in formulating our legislation, the private action!

Secretary MARSHALL: Yes, sir

The CHAIRMAN: Just to clarify the position of the worker now, is it correct that there is no personal action for back pay!

Secretary MARSHALL: Back pay-excuse me.

The problem we have, as you know, and in most of our legislation, is that it is not self-enforcing.

It is very difficult for us to adequately enforce the law with resources available to us. We, therefore, have to rely as much as we can on complaints by workers who are affected, in order to get enforcement, and this concern is a good bit.

We also have limited resources in bringing suits, and there might be delays that could affect the workers' rights, so that they cannot bring suits themselves for enforcement, and their rights are not adequately protected under the law, and we think it will strengthen both our ability to enforce the law, and the workers' ability to secure rights under the act, if this amendment is made.

The CHAIRMAN: Was this suggested when you testified on the House side before they marked their bill up in committee over there!

Secretary MARSHALL. No, we did not.

The CHAIRMAN: This idea was not raised at the House bearings. Was it raised in the committee!

Secretary MARSHALL: I do not think it was in the committee. We did not think to get it in there. But we think it would be a good idea to be considered now.

The CHAIRMAN: What would be the nature of the action! The worker can now sue for unpaid back wages, the claims that are due under the minimum wage, what would be the nature of the action that you would propose!

Secretary MARSHALL: Well, what would happen under this proposal is not only would we sue for back pay, but for reinstatement if you had been unjustly discharged because you complained, and that protects you against the loss of your job. And we think if employers knew employees had this added right, it would deter them from their rights under the act.

Let me see if my solicitor would like to add anything.

Ms. CLAUSE: That is it.

Secretary MARSHALL:.. Since I am not a lawyer; I have to give it out own in my own way.

The CHAIRMAN: What action would be taken to get the employer to change the wage!

Secretary MARSHALL: Now, so far, there are only acts in the missing needs here, and that is to get the employer to change the wage rates. If he persists, then he gets sued for back wages again.

The CHAIRMAN: Is there any way to enjoin that rate, or get then to pay the legal rate!

Ms. CLAUSS: There is no point of action.

The CHAIRMAN: But under your proposal, is there!

Ms. CLAUSS: No, because we feel we have the resources to bring the Injunction suit.

The kind of problem we are concerned about here is where an employee complains to us that he was being unpaid, underpaid; if we bring a suit on his behalf and on behalf of his coworkers, and we win, and the wages are raised, but a month later that employee loses his job.

Now, we have to decide whether we can afford the resources to get this man's job back, or to use the resources to get wages increased elsewhere. We want him to have that private right, as well as our right, you see?

The CHAIRMAN: You will still be the sole enforcement agency in getting the rate changed!

Ms. CLAUSS: That is right. We are proposing no change there.

The CHAIRMAN: Do you have the resources to handle that!

Ms. CLAUSS: That is right.

The CHAIRMAN: I have good news for you.

During the hearing yesterday on our age discrimination bill, the chamber of commerce opposed lifting the 65 year cap. There are various bills as you know. The proposed bill that I advanced would raise the age differential to 70, with a study to see the effects, and could be cut off altogether in a couple of years item from now. But the chamber of commerce is opposed to that. Although they recognize that older people capable and desirous to continue working--should have job opportunities, they are opposed for sociological reasons. In addition they also oppose taking out the opportunity to have a mandatory retirement pension plan at 65.

However, they are sympathetic with worker's whe are 65 possessing that ability to work. They came out with some of the most glowing testimony that I have heard, and I thought you would be pleased to know that.

Secretary MARSHALL: I would like to get a copy of that, Mr. Chairman.

OPPOSITION
BRIEF

Supreme Court, U.S.
FILED

FEB 12 2010

OFFICE OF THE CLERK

No. 09-834

IN THE

Supreme Court of the United States

KEVIN KASTEN,

Petitioner,

v.

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Has an employee alleging solely that he orally asserted objections to his employer regarding the location of time clocks "filed any complaint" within the meaning of Section 215(a)(3) of the Fair Labor Standards Act?

CORPORATE DISCLOSURE STATEMENT

Respondent Saint-Gobain Performance Plastics Corporation ("Saint-Gobain") is a wholly owned subsidiary of Saint-Gobain Ceramics & Plastics, Inc., which is in turn a wholly owned subsidiary of Saint-Gobain Abrasives, Inc. which is a wholly owned subsidiary of Saint-Gobain Delaware, which is a wholly owned subsidiary of Saint-Gobain Corporation, which is an indirect subsidiary of Compagnie de Saint-Gobain, a Paris-based corporation which is publicly owned and traded on the French Bourse.

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COUNTER-STATEMENT OF THE CASE

The Fair Labor Standards Act ("the Act"), 29 U.S.C. § 215(a)(3), provides private remedies for employees who have suffered adverse employment actions as a result of engaging in certain specific protected activities. In relevant part, the statute provides that:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

Between October 2003 and December 2006, Kevin Kasten was employed in various manufacturing and production capacities by Saint-Gobain. Petitioner's Appendix ("Pet. App.") 64. Throughout 2006, Mr. Kasten was subject to Saint-Gobain's progressive Corrective Action Program because of a series of missed time clock punches, in violation of the company's time and attendance policies. Pet. App. 64-66. This progressive discipline culminated in a final warning. On November 10, 2006, Mr. Kasten was informed that "if the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination." Pet. App. 65. On December 11, 2006, Saint-Gobain informed Mr. Kasten that his employment was terminated because of another failure to punch the time clock. *Id.*

Nine months later, on September 12, 2007, Mr. Kasten filed a wage and hour complaint with the Equal Rights Division of the Wisconsin Department of Workforce Development. Pet. App. 64. On December 5, 2007, Mr. Kasten filed this lawsuit alleging that Saint-Gobain terminated his employment in retaliation for oral statements he had allegedly made to supervisors in the months before his termination. Pet. App. 64. Specifically, Mr. Kasten alleged that before his termination, he had made certain comments to supervisors and other employees regarding potential legal and efficiency implications of the location of the company's time clocks. Mr. Kasten admitted that he did not submit any writing to Saint-Gobain, that he did not contact any government agency either orally or in writing, and that he did not file a lawsuit prior to the termination of his employment. Pet. App. 70.

On June 19, 2008, the District Court granted summary judgment to Saint-Gobain and dismissed Mr. Kasten's claim. Pet. App. 63-72. The District Court reasoned that Mr. Kasten had not engaged in protected activity under the Act, because his internal, oral objections did not satisfy the requirements of Section 215(a)(3), as they were not "filed." Pet. App. 70. Further, the District Court held that Mr. Kasten's objections were at most "abstract grumbling or amorphous expression[s] of discontent," and therefore were not protected even under a view of Section 215(a)(3) that encompasses oral, internal complaints. Pet. App. 70.

Mr. Kasten appealed, and in an opinion authored by Judge Joel Flaum, a three-judge panel of the United States Court of Appeals for the Seventh Circuit unanimously held that Mr. Kasten's oral, internal statements did not constitute protected activity. Pet. App. 32-43. The court concluded that while the Act protects complaints made internally to employers, the statutory term "filed" requires that complaints be made in writing. Pet. App. 43. Mr. Kasten petitioned for rehearing and rehearing *en banc*, which the Seventh Circuit denied. Pet. App. 1-14.

REASONS FOR DENYING THE PETITION

This case involves the interpretation of a solitary, straightforward phrase in a single federal statute. The facts, taken as true for purposes of this Opposition are straightforward. An employee alleged that on several occasions he made oral comments to his supervisors to the effect that the location of time clocks at his employer's facility were unlawful and inefficient. Specifically, he asserted that he orally stated to his supervisors that employees were required to spend time off the clock donning and doffing protective garments because the time clocks were located within clean room areas. The District Court granted summary judgment to the employer, a unanimous panel of the United States Court of Appeals for the Seventh Circuit affirmed, and seven of ten judges voted to deny rehearing *en banc*. Mr. Kasten seeks further review, claiming that a mature split among the circuits exists on the question of whether his internal, oral grievances constitute complaints that were "filed" within the meaning of the Fair Labor Standards Act.

The Petition presents no sound basis for the Court to exercise jurisdiction. Contrary to Mr. Kasten's argument, the Seventh Circuit's decision did not "create[ ] a clear disagreement among the circuits" requiring resolution. Pet. 16. Rather, the Seventh Circuit is the only federal court of appeals that has expressly analyzed the statutory term "filed" when presented with an oral, internal complaint. The Second and Fourth Circuits have concluded that internal complaints, whether written or oral, are not statutorily protected activity. The First, Ninth and Tenth Circuits have held that internal, written complaints are protected. Outside of dicta, only the Fifth, Sixth, Eighth, and Eleventh Circuits have permitted claims by plaintiffs who alleged only oral, internal complaints. However, in their opinions, these four courts did not expressly analyze the statutory term "filed," and the distinction between written and oral complaints. Neither the Seventh Circuit nor any other federal court of appeals has held that an employee who is terminated because he or she commences a governmental investigation or files and serves a lawsuit has no protection from retaliation under the Act.

In its decision, the Seventh Circuit thoroughly examined the plain language of the phrase "filed any complaint," harmonized it with the Act's other statutory terms and provided reasoned bases for its holding. Accordingly, Saint-Gobain respectfully submits that the Court should permit the federal courts to review and examine this reasoning, and that the question presented does not require this Court's attention or the parties' further resources.

I. THE DECISION BELOW CORRECTLY INTERPRETS THE PLAIN LANGUAGE OF THE FAIR LABOR STANDARDS ACT.

The Seventh Circuit properly interpreted the statutory term "filed" in holding that Mr. Kasten's oral complaints to his supervisors did not constitute activity protected by the Act. Section 215(a)(3) applies only in enumerated circumstances, including those where an "employee has *filed* any complaint or *instituted or caused to be instituted* any proceeding under or related to" the statute. 29 U.S.C. § 215(a)(3) (emphasis added). The sole issue in this case is the scope of the statute's protection of an employee who "has filed any complaint" under its provisions. Based upon the language of the statute, both courts below concluded that the phrase "filed any complaint" is sufficiently clear in the context of this statute to require the submission of a written document. Pet. App. 43, 70.

The plain language of the statute demonstrates that the intent of Congress in enacting Section 215(a)(3) is clear and unambiguous. It is axiomatic that the "'starting point [in statutory interpretation] must be the language employed by Congress.'" *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citation omitted); *Mallard v. U.S. Dist. Court for S. Dist. Of Iowa*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language"); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). By its terms, Section 215(a)(3) "prohibits retaliation based on three expressly enumerated types of conduct." *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994) (citing

E.E.O.C. v. Romeo Cmty. Schs., 976 F.2d 985, 990 (6th Cir. 1992) (Suehrenreich, J., dissenting).

The Seventh Circuit held that purely oral, unwritten complaints were not "filed" within the common understanding of the statutory term. Pet. App. 43. In concluding that the term "filed" requires that the employee submit a writing, the court's plain language interpretation follows Webster's Ninth New Collegiate Dictionary, which defines the verb "to file" as

> 1. to arrange in order for preservation and reference <"file letters"> 2. a: to place among official records as prescribed by law <"file a mortgage"> b: to perform the first act of (as a lawsuit) <"threatened to file charges against him">

Pet. App. 39.

Further, the Seventh Circuit compared Section 215(a)(3) with the language of other, broader anti-retaliation statutes. Pet. App. 38. Specifically, Title VII and the Age Discrimination in Employment Act forbid retaliation by employers against any employee who "has opposed any practice" those statutes make unlawful.[1] 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); *see also Genesee Hosp.*, 10 F.3d at 55 (comparing Section

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[1] Other statutes offer broader protection to employees who "participate in any manner . . . in any other action to carry out the purposes" of a statute. *See, e.g.*, 42 U.S.C. § 5851(a)(1)(F) (nuclear facilities), 42 U.S.C. § 7622(a)(3) (air pollution); 29 U.S.C. § 1140(a) (ERISA); 29 U.S.C. § 1855(a) (Migrant and Seasonal Agricultural Protection Act).

215(a)(3) with other statutes). By enacting this distinct statutory language in these instances, Congress made legislative choices establishing different statutory triggers for employee protection than under the Fair Labor Standards Act.

While failing to address this disparity in language chosen by Congress, Mr. Kasten proposes an interpretation that would require an identical reading of the different statutory phrases "filed any complaint," "opposed any practice," and "participate in any manner." Similarly, Mr. Kasten attempts to conflate the term "file" with "submit." Pet. 24. However, of the various other dictionary definitions of the verb "file" relied upon by Mr. Kasten, all but one contemplate a written document, such as "copy" to a newspaper, "an application for a patent, a petition for divorce," and "an application, petition." *Id.* (citing Pet. App. 58-59, 114). Consistent with the Seventh Circuit's interpretation, each of these examples refers to the submission of a writing, not mere oral statement.

Having found no definitional support in standard references, Mr. Kasten offers his own alternative "idiomatic meaning" of the word "filed"; that is, "to make a complaint known to the responsible party." Pet. 25. To bolster this interpretation, Mr. Kasten raises two arguments. First, he asserts that because a number of other statutes specify that complaints thereunder be "in writing," Section 215(a)(3) must not be read to contain this requirement. Pet. 27. However, uses of the term "in writing" to modify the word "complaint" offer no real insight into the meaning of the verb at issue – "to file." But many of the statutes cited by Mr. Kasten do not include any variation on the word "filed."[2] Mr. Kasten cites other statutes specifying a number of explicit procedural and formal requirements of a proper complaint, including that it be in writing.[3] In each case, these terms modify the word "complaint," not the term "filed." The statutes merely set forth the various characteristics of a legitimate complaint under the respective provisions.

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[2] *See* 7 U.S.C. § 228b-2(a) (Packers and Stockyards Act) ("cause a complaint in writing to be served"); 7 U.S.C. § 193(a) (same); 7 U.S.C. § 1599(a) (Federal Seed Act) (same); 15 U.S.C. § 80b-9(a)("informs the agency concerned in writing"); 33 U.S.C. § 392 (Clean Water Act) ("presented to the court"); 42 U.S.C. § 2000(b)(a) (Civil Rights Act) ("receives a complaint in writing"); 42 U.S.C. § 2000c-6(a)(same).

[3] *See* 2 U.S.C. § 437g(a)(a) (Federal Election Campaign Act) ("Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury"); 5 U.S.C. § 3330a(a)(2)(B) (Veterans Employment Opportunities Act) ("Such complaint shall be in writing, be in such form as the Secretary may prescribe, specify the agency against which the complaint is filed, and contain a summary of the allegations that form the basis for the complaint"); 38 U.S.C. § 4322(b) (Uniformed Services Employment and Reemployment Act) ("Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint"); 15 U.S.C. § 80b-9(a) (Investment Company Act) ("statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation"); 42 U.S.C. § 3610(a)(1)(A)(ii) (Fair Housing Act) ("Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires"); 42 U.S.C. § 15512(a)(2)(C) (Help America Vote Act) ("shall be in writing and notarized, and signed and sworn by the person filing the complaint"). 15 U.S.C. § 80b-9(a) ("file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation"). Only one cited statute uses the phrase "file a complaint in writing" without including further modifiers. *See* 49 U.S.C. § 31105(a) (Surface Transportation Assistance Act).

Second, Mr. Kasten cites a number of inapposite administrative agency decisions, and state court statutes, regulations and judicial decisions that, without context or explanation, describe motions or grievances "filed orally." Pet. 25-26. But Mr. Kasten's selective reliance on random instances of imprecise use of language among the countless statutes, regulations and decisions cannot overcome the common understanding that "to file" requires the submission of a writing. Indeed, Mr. Kasten has failed to cite a single reported federal judicial opinion referring to an "oral filing." Nor has he cited a single federal statute in which the "filing" of an "oral" complaint is expressly permitted.

Finally, Mr. Kasten appeals to the "remedial and humanitarian purpose" of the Act to support a reading of its language beyond its terms. Pet. 23. Notwithstanding Mr. Kasten's heavy reliance on Congressional intent, he fails to quote any specific aspect of the legislative history of Section 215(a)(3) that would support a conclusion that the term "filed" was intended to mean anything other than the submission of a written document. Mr. Kasten points to *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960), stating only that enforcement of the statute required that "employees felt free to *approach officials* [not employers] with their grievances," an objective which can equally, if not more effectively, be accomplished by "institut[ing] a proceeding." But the record is devoid of any evidence from which the Court could decipher that Congress intended Section 215(a)(3) to apply to unwritten grievances presented orally to employers.

Further, because the Act's language is clear, its modification on policy grounds is solely the province of Congress. For example, in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 626 (2007), the Court concluded that the phrase "employment practice" referred to a discrete act or occurrence for purposes of calculating Title VII's statute of limitations. Addressing Ms. Ledbetter's policy arguments calling for special treatment of pay claims to effect Title VII's "broad remedial purpose," the Court stated: "we are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the prompt processing of all charges of employment discrimination . . . and the interest in repose." *Id.* at 641 (internal quotation omitted). In enacting the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, superceding *Ledbetter*, Congress recalibrated this balancing of interests through legislation. *See Ledbetter*, 550 U.S. at 637 (Ginsburg, J., dissenting) ("[T]he Legislature may act to correct this Court's parsimonious reading of Title VII.").

Although this Court has not addressed the scope of Section 215(a)(3), Mr. Kasten contends that evidence of Congressional intent may be gleaned from this Court's application of an amorphous canon of "expansive" statutory interpretation. Citing *Tenn. Coal, Iron and R.R. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944), Mr. Kasten incorrectly asserts that the Seventh Circuit "failed to confer any weight" to the statute's remedial purpose. Pet. 23. To the contrary, the court properly stated that "expansive interpretation is one thing; reading words out of a statute is quite another." Pet. App. 36. After considering the statutory language, the court concluded that it could not be stretched to encompass Mr. Kasten's claim. In so doing, the Seventh Circuit declined to substitute its policy preferences and relied upon this Court's guidance that it is "most impermissibl[e]" for a court to "rel[y] on its understanding of the broad purposes" of a statute in order to extend the meaning of statutory terms when those terms are "sufficiently clear in . . . context." *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987) (internal quotation marks omitted); *Union Bank v. Wolas*, 502 U.S. 151, 158, 162 (1991). Indeed, this Court assumes "'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Am. Tobacco*, 456 U.S. at 68 (citation omitted); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). For this reason, "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *Am. Tobacco*, 456 U.S. at 75 (citation omitted).

Even if the Court were inclined to disregard the plain language of Section 215(a)(3) in favor of a vaguely stated conception of Congressional intent, the Act's post-enactment legislative history provides a better and more specific guide than this Court set forth sixty-six years ago in *Tenn. Coal.* In 1985, Congress enacted a temporary statute broadening the scope of Section 215(a)(3). *See* Fair Labor Standards Act Amendments of 1985, Pub. L. No. 99-150, § 8, 99 Stat. 791 (1985). In language reminiscent of the broader scope of Title VII, the Age Discrimination in Employment Act and other statutes, it afforded protection to certain federal employees who "asserted [the Act's] coverage" to their employer. *Id.* This broader language did not require the filing of a complaint, as described in Section 215(a)(3). After this Court upheld application of the Act to state and local government employees in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted this broader protection for such employees during the initial period of adjustment to Act requirements. According to the plain language of that law, after it expired in August 1986, protection against retaliation would apply "only" to "an employee who takes an action described in" Section 215(a)(3). *Id.* If the statutory phrases "filed any complaint" and "asserted [the Act's] coverage" had identical meaning, activities like those alleged by Mr. Kasten were already within the purview of Section 215(a)(3), and the temporary enactment would have been meaningless and wholly unnecessary. This "[subsequent legislation] declaring" Congress's clear understanding of the limits of Section 215(a)(3) "is entitled to great weight." *Loving v. U.S.*, 517 U.S. 748, 770 (1996). As the language of the Act is clear on its face, there is no need to go beyond the statute in an attempt to create a contrary meaning.

II. NEITHER THE STATE OF LAW IN OTHER FEDERAL COURTS NOR ANY OTHER PRUDENTIAL CONSIDERATION COUNSELS IN FAVOR OF REVIEW.

A. The Seventh Circuit Decision is Squarely Within the Reasoned Holdings of Other Federal Courts.

Laboring to establish a basis for this Court's review, Mr. Kasten incorrectly contends that the Seventh Circuit's decision "conflicts with the decisions of all other Federal Courts of Appeals to have considered the issue and conflicts with the instructions of this Court. . . ." Pet. 8. With respect to the question presented, this statement is plainly inaccurate. Indeed, while the Seventh Circuit for the first time explicitly analyzed the question of whether oral complaints to employers are protected, the decision below is reasonable in light of the previous, reasoned holdings of federal circuit courts throughout the country.

Mr. Kasten exaggerates the distinctions among prior circuit court decisions in an effort to establish a mature conflict requiring this Court's attention. Contrary to Mr. Kasten's assertion, the decision below falls within the holdings of five circuit courts on the question presented. The Second and Fourth Circuits have also concluded that oral complaints to employers do not constitute statutorily protected activity. In *Genesee Hosp.*, 10 F.3d at 55, female plaintiffs claimed that they had orally complained to their supervisors that their lower pay as compared to male colleagues as "unfair." The Second Circuit concluded that "[t]he plain language of [Section 215(a)(3)] limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.". This holding is in accord with that reached by the Fourth Circuit in *Ball v. Memphis Bar-B-Q Co., Inc.*, excluding oral statements to a supervisor from statutory protection. *See* 228 F.3d 360, 364 (4th Cir. 2000) (interpreting the statute's "testimony" clause).

Moreover, in line with the Seventh Circuit, the First, Ninth and Tenth Circuits have held that written complaints to employers are protected, without reaching binding holdings as to oral complaints. In *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), employees not only presented written requests for overtime pay supported by the applicable statutes and regulations to their employer, but also complained directly to the Department of Labor. The Ninth Circuit was not called upon to address the status of oral complaints, and in any event, the plaintiffs' initiation of contact with the Department of Labor would have "instituted a proceeding" under the Act. Accordingly, as the Seventh Circuit recognized, the language in *Ackerley* concerning oral complaints to employers was no more than dicta. Pet. App. 14, n.3. Similarly, in *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984), the employee did not make an oral complaint, but rather attached a copy of the Equal Pay Act to a written complaint to her employer. In *Valerio v. Putnam Associates, Inc.*, 173 F.3d 35, 42, n.4 (1st Cir. 1999), the First Circuit explicitly recognized the oral/written distinction, and properly declined to address the protected status of oral, internal complaints. Indeed, the *Valerio* court implied that a purely oral complaint would be insufficient, stating that "[w]e may question how far one may go to permit a written complaint to be augmented orally. We leave for another day whether combined oral and written complaints, or alleged complaints of a wholly oral nature, allow invocation of the protections of § 215(a)(3)." *Id.*

Relying heavily on a liberal interpretation and expansive reading, and without discussing the distinction between oral and written complaints, the Fifth, Sixth, Eighth and Eleventh Circuits have permitted claims to proceed where plaintiffs alleged that they made only oral, internal complaints. *See Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (concerning an internal, oral complaint after a DOL investigation and agreement by employer to pay back wages, without analysis as to the scope of Section 215(a)(3)); *E.E.O.C. v. White and Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (concerning an internal, oral complaint of gender discrimination, but noting that the charging parties "did not perform an act that is explicitly listed in the FLSA's anti-retaliation provision"); *Romeo Cmty. Sch.*, 976 F.2d at 989 (concerning an internal, oral complaint of gender discrimination under the Equal Pay Act, over a dissent); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008) (concerning internal oral complaints only where employee "steps outside the role" as employee and engages in something more than "abstract grumblings").[4] Not one of these opinions expressly analyzed the term "to file" as used in the statute.

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[4] Mr. Kasten further relies upon *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987), in which the plaintiff employee contended that his believed participation in a Department of

(Cont'd)

Even assuming that a true and mature divergence among reasoned opinions of the circuit courts exists, these decisions have existed in harmony for years without difficulty. Indeed, when this Court has had occasion to grant certiorari on the question presented, it has declined. As early as 1993, the Second Circuit held in *Genesee Hosp.*, 10 F.3d at 55, that employees' internal complaints to their supervisors do not constitute protected activity. This Court denied certiorari in that case, and again when the issue was raised in *Ackerley*, 180 F.3d 997, *cert. denied*, 528 U.S. 1116 (2000). Nothing in the record reflects that any variance in these decisions has yielded "national legal confusion," or proven "unworkable," as Mr. Kasten asserts. Pet. 16. Indeed, a review of the cases cited by the parties reveals only that the issue has arisen so infrequently over the years that it could not be deemed one demanding this Court's attention. Having analyzed the term "to file" explicitly in statutory context for the first time, the Seventh Circuit opinion provides a reasoned interpretation that other courts may follow without this Court's intervention.

(Cont'd)

Labor investigation constituted protected activity. Because it does not involve the question presented, *Brock* is inapposite. Indeed, the court based its holding on the policy of ensuring that employees are "free to *approach officials* with their grievances." *Id.* at 124 (emphasis added).

B. The Petition Presents No Question of Exceptional Importance.

Faced with an ordinary matter of statutory interpretation, Mr. Kasten struggles to identify a reason to justify this Court's review. Each of Mr. Kasten's arguments relies almost exclusively upon his view that the Seventh Circuit decision does not accommodate his preferred policy outcomes. First, Mr. Kasten contends that the decision below "poses a serious obstacle to administration of the law in the Seventh Circuit." Pet. 8. To the contrary, the court's holding states a clear rule of law: employees seeking to base an Act claim upon an internal grievance to a supervisor must do so in writing. Pet. App. 45. No evidence in the record confirms Mr. Kasten's speculation that an employee is "more likely" to approach an employer with an oral complaint, rather than a written document. Pet. 18. This is particularly true, now that the law in the Seventh Circuit has been plainly stated for the first time so that employees may understand it. If anything, a requirement that an employee submit his complaint in writing furthers the courts' legitimate interest in ensuring that an easily verifiable, protectable complaint was in fact made. Although the conclusion reached by the Seventh Circuit does not advance Mr. Kasten's policy preferences, he offers no support for an argument that it cannot be effectively administered.

Second, Mr. Kasten contends in another burst of rhetoric that the holding below "eviscerates the statute's protection for workers who bring violations . . . to their employer's attention." Pet. 18. While the Seventh Circuit did not adopt Mr. Kasten's all-encompassing interpretation of the Act, employees who complain to their employers in writing are protected under its holding. Similarly, employees who file lawsuits against their employers, or initiate administrative investigations or other governmental proceedings, may avail themselves of the Act's statutory protections.

For the same reason, contrary to Mr. Kasten's assertion, the Seventh Circuit decision has no impact on the "flow of information to the Department of Labor." Pet. 17. According to Mr. Kasten, employees contacting federal agencies to inform them of an employer's unlawful conduct would be without legal recourse in the event of retaliation. Pet. 20. These arguments again conflate the statutory language in yet another way. To the extent that such activity constitutes "instituting a proceeding," it is protected separately by a clause not at issue in this case. The Seventh Circuit did not construe, and its decision did not limit, the statutory protection for employees who "institute a proceeding" with a government agency. Rather, it addressed the circumstances under which a grievance to an employer may constitute statutorily protected activity.

Even if the Seventh Circuit's construction of the term "filed any complaint" implicated communications to federal agencies, Mr. Kasten's argument that the court's decision would somehow create "confusion" is unsupported. Pet. 20. He cites two websites through which employees may contact the Department of Labor and the Equal Employment Opportunities Commission, though neither states that a complaint may be "filed" through this method or through a telephone call.[5] Ultimately, Mr. Kasten's professed concerns that the Seventh Circuit opinion will have a "tremendous chilling effect" on employee reporting and "nearly obliterate the viability of enforcement mechanisms" are unfounded. Pet. 21. Employees approaching federal agencies to "institute a proceeding" are protected under the statute regardless of the interpretation of the phrase "filed any complaint," and no prudential consideration supports an exercise of this Court's discretion to further review this matter.

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[5] *See* Pet. 20, n.18 citing *www.dol.gov/whd/contact_us. htm* and *www.eeoc.gov/contact/index.cfm.*

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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REPLY
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In the Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent fails to adequately confront the clear split among the circuits regarding whether 29 U.S.C. § 215(a)(3) protects oral complaints, is unable to explain how the Fair Labor Standards Act ("FLSA") can be enforced when employees have reason to fear retaliation for discussing violations, and presents an interpretation of section 215(a)(3) which is contrary to evidence of Congressional intent. Certiorari should be granted.

I. THIS CASE PRESENTS A SUBSTANTIAL INTER-CIRCUIT CONFLICT.

Respondent does not seriously dispute the existence of the inter-circuit conflict, which even the Seventh Circuit and district court candidly recognized. Respondent expressly acknowledges that the Fifth, Sixth, Eighth and Eleventh Circuits have all held that oral complaints are protected by section 215(a). Br. Opp. 15-16.[1] Respondent asserts that any Tenth Circuit language indicating that oral complaints are protected is dicta which should be disregarded.

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[1] Respondent describes the decision in *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F. 3d 360 (4th Cir. 2000), as "excluding oral statements to a supervisor from statutory protection" Br Opp. 14. *Ball* actually held only that such statements do not constitute "testimony" at a "proceeding" under the FLSA. 228 F 3d at 384

Br. Opp. 4. In *Pacheco v. Whiting Farms, Inc.*, 365 F. 3d 1199, 1203, 1206 (10th Cir. 2004), however, the only complaint was oral, and the Tenth Circuit expressly held that it constituted protected activity. Respondent also claims that the Ninth Circuit did not expressly hold that oral complaints are protected. Br. Opp. 4. However, in *Lambert v. Ackerley*, the Ninth Circuit expressly held that the plaintiff's oral and written complaints were *both* protected. 180 F.3d 997, 1001, 1007-08 (9th Cir. 1999) (*en banc*) ("[T]he employee may communicate such allegations orally or in writing, and need not refer to the statute by name.").[2]

Although conceding that several circuits hold that oral complaints are protected, Respondent suggests that they now "may follow" the Seventh Circuit, and overturn their own longstanding precedents. Br. Opp. 16. The circuits may repudiate their prior decisions, Respondent urges, because they "relied heavily on a liberal interpretation and expansive reading," whereas Seventh Circuit provided a "reasoned interpretation" of section 215(a)(3) Br. Opp. 15, 16.

That is not a plausible basis for denying review. The construction of section 215(a) in the Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh

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[2] *See Bates v. Lucht's Concrete Pumping, Inc.*, No. CV. 05-796-PK, 2006 WL 4097295 at *2, *5 (D. Or. Dec. 6, 2006) (applying *Ackerley*'s protection of oral complaints).

Circuits *is* the majority view. The clear conflict at issue could only end if all of these Circuits now reheard this issue *en banc*. There is no remote possibility that that will occur. The Seventh Circuit's interpretation of section 215(a) is hardly so obviously correct that six other Circuits will abandon precedent reaching back more than three decades. Indeed, the Seventh Circuit even failed to persuade several other members of its own court. Certiorari is warranted to resolve this conflict.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

As the Department of Labor explained, oral complaints are common under the FLSA. App. 23, 59-60.[3] The dissenting opinion warns that if section 215(a) does not apply to oral complaints, there will be no protection for workers who contact the Department in person or by telephone. App. 9-10. Respondent does not deny that such contacts would not be protected as "complain[ts]" under the panel decision; it suggests, however, that a worker who speaks with the Department of Labor might be covered by the clause forbidding retaliation against any person who "instituted any proceeding under or related to this Act." Br. Opp. 14, 18, 19. Respondent offers no authority to support this proposition.[4]

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[3] *See e.g.*, *Knickerbocker v. City of Stockton*, 81 F.3d 907 (9th Cir. 1996), *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); *Ritchie v. St. Louis Jewish Light*, No. 4:09-CV-1947, 2010 WL 502946 at * 5 (E.D. Mo. Feb. 8, 2010), *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 996 (E.D. Mo. 2009), *Jackson v. Advantage Commc'n, Inc.*, No. 4:08CV00353, 2009 WL 2508210 at *6 (E.D. Ark. Aug. 14, 2009), *Burns v. Blackhawk Mgmt. Corp.*, 494 F. Supp. 2d 427 (S.D. Miss. 2007); *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 778 (N.D. Ill. 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 690 (E.D. Wis. 2007); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *Skelton v. Am. Intercontinental Univ. Online*, 382 F. Supp. 2d 1068, 1076 (N.D. Ill. 2005), *Truex v. Hearst Commc'n, Inc.*, 96 F. Supp. 2d 652 (S.D. Tex. 2000); *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322 (W.D. Va. 1999)

A mere conversation between a worker and Labor Department officials could not plausibly be described as "institut[ing] any proceeding."[5] There is a distinct difference between filing an oral complaint and instituting proceedings. "Institute[] any proceeding" refers to the commencement of some form of structured proceeding such as a lawsuit or administrative hearing:

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[4] Respondent asserts that in *Ackerley*, "the plaintiffs' initiation of contact with the Department of Labor would have 'instituted a proceeding' under the Act." (R Br. 14). However, the court relied exclusively on the "complaint" clause in that decision. *Ackerley*, 180 F.3d at 1004 The original panel decision expressly held that the "instituted any proceeding" clause did not apply. *Lambert v. Ackerley*, 156 F 3d 1018, 1023-24 (9th Cir. 1999) (reversed on other grounds).

[5] Congress rejected the following language, which would have protected workers who complain orally to the Department and the complaint leads to investigation or suit, as Respondent suggests: "instituted or caused to be instituted any investigation or proceeding". 83 Cong. Rec. 7377 (1938) (Remarks of Rep. Ramspeck).

> As used in the Act, "proceeding" is modified by attributes of administrative or court proceedings; it must be "instituted," and it must provide for "testimony." . . . The term "instituted" connotes a formality that does not attend an employee's oral complaint.

Ball, 228 F. 3d at 364. Federal agencies themselves—not complaing workers—regularly decide not to "institute proceedings" by taking enforcement action or filing a lawsuit in response to complaints. *See Heckley v. Chaney*, 470 U.S. 831, 834-35, 838 (1985) (there is a "presumption that agency decisions not to *institute proceedings* [in response to complaints or inquiries] are unreviewable") (emphasis added). Thus, while employees may file an oral complaint with the Department, it would not qualify as instituting a proceeding, and would remain unprotected.

Respondent insists that workers in the Illinois, Indiana and Wisconsin will understand that only written complaints are protected, and will thus be unlikely to complain orally, "now that the law in the Seventh Circuit has been plainly stated for the first time so that employees may understand it." Br. Opp. 17. But there is no realistic possibility that workers will learn what was "stated" in the "clear" decision below. Few workers have lawyers on retainer to provide legal advice about such matters, and employers are not going to warn their employees that they can be dismissed for oral but not written complaints. Many employers (Respondent included) do the opposite, implementing a complaint hotline or an oral complaint process, which invite employees to report orally up the chain of command. This, combined with administrative agencies' publications encouraging employees to verbally report violations,[6] will ensure that employees remain unaware that they can be fired for following company or administrative protocol.

Respondent relies on the denial of certiorari in *Ackerley v. Lambert*, 528 U.S. 1116 (2000), and *Lambert v. Genesee Hospital*, 511 U.S. 1052 (1994) to claim that the question presented is not of exceptional importance. However, the questions presented in those petitions concerned whether internal complaints to employers are protected, not whether oral complaints are protected. In both *Ackerley*[7]and *Lambert*,[8] the briefs in opposition advanced substantial arguments that there was no genuine inter-circuit conflict. Similar arguments are unavailing here, where the conflict has been consistently acknowledged at all judicial levels and by all parties. Certiorari is appropriate to resolve this question of exceptional importance.

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[6] *See e.g.*, Employee Rights Under The Fair Labor Standards Act (Jul 2009), http://www.dol.gov/whd/regs/compliance/posters/minwage.pdf (last visited Feb. 19, 2010); Equal Employment Opportunity Is The Law (Nov. 2009), http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf (last visited Feb. 19, 2010).

[7]In *Ackerley*, petitioners asserted that *Genesee Hospital*, 10 F. 3d 46 was in conflict. Respondents disagreed:

> [A]ll indications are that the Ninth Circuit would *not* disagree with the Second Circuit's resolution of that issue . Nor do the Second Circuit's precedents clearly indicate that it would reach a result different from that of the Ninth Circuit on the facts of this case

Brief of Respondents in Opposition to Petition for Writ of Certiorari at 10-12, *Ackerley v. Lambert*, 528 U.S. 1116 (2000) (No 99-681) .

[8] Respondents in *Genesee Hospital* explained

> [The Second] Circuit's actual holding does not create a conflict with [other Circuits] opinions, given the circumstances of this case In none of those opinions did a court permit an informal complaint to a supervisor to serve as a predicate for an Equal Pay Act retaliation claim where the complaint is merely one of "unfair" wages. . . . The Second Circuit has not indicated whether it will expand its holding below to include informal complaints that clearly state their basis in the Equal Pay Act.

Brief of Respondents in Opposition to Petition for Writ of Certiorari at 20-21, *Lambert v. Genesee Hosp.*, 511 U.S. 1052 (1994) (No 93-1388), *available at* 1994 WL 16100427.

III. THE COURT OF APPEALS' DECISION IS INCORRECT.

Respondent's defense of the Seventh Circuit opinion rests on a single, ultimately unpersuasive premise: there is a "common understanding that 'to file' requires the submission of a writing." Br. Opp. 9. Respondent concedes that there are numerous statues, regulations and judicial decisions which refer to "filing" oral complaints, objections, and motions, but nevertheless claims that the word "file" unambiguously requires a writing. Br. Opp. 9, 12. If "file" meant "submit in writing", these would be nonsense statements, like "photocopy a scent." Respondent dismisses this language as mere "imprecise use of language." Br. Opp. 9. To the contrary, as the dissent pointed out, the language deliberately chosen by federal and state officials reflects a common usage. App. 6.

The dissent emphasized that when Congress wants to require a *written* complaint it expressly says so in the statute. App. 7-8. Respondent objects that this limiting language in numerous statutes is irrelevant because Congress used "written" as an adjective to modify "complaint" (i.e., "file a written complaint") rather than utilizing an adverbial phrase to modify "file" (i.e., "file in writing a complaint"). Br. Opp. 8-9. This grammatical distinction makes no sense. The other statutes including this language are probative for two reasons. First, they demonstrate that Congress, having chosen to expressly impose such a limitation in other statutes, can be assumed not to have meant to do so in the FLSA. Second, if Congress understood "file" to mean "file in writing," these other statutes would have been redundant, requiring that individuals "file in writing a written complaint."

The broader intent of Congress is confirmed by the fact that section 215(a) protects a worker who "filed *any* complaint." (emphasis added). The adjective "any" makes clear that Congress did not want the protections in section 215(a) to be limited to certain types of complaints.

Respondent urges that Congress made a "legislative choice[]" to afford less protection under the FLSA by using more restrictive language than in other statutes. Br. Opp. 6-7. This argument is unavailing for two reasons. First, the FLSA was enacted in 1938; Title VII and the Age Discrimination in Employment Act ("ADEA"), on which Respondent primarily relies, were adopted in 1964 and 1967[9] respectively. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d) Obviously, Congressional choice of language in 1938 did not represent a rejection of the wording of statutes not enacted until three decades later. Second, the "opposition clause" protections in those later statutes extend far beyond oral complaints. For example, Title VII's "opposition clause" includes protection for silently refusing to obey an order that could violate the statute, picketing, production slow-downs, or requesting religious accommodations. *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S.Ct. 846 (2009); 2 EEOC Compliance Manual § 8-II-B(2), 614. An "opposition" clause is therefore not an alternative to the "file any complaint" language in the FLSA, but actually encompasses that language as only one of several forms of protected activity.

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[9] The additional cited statutes in Respondent's footnote 1 were also enacted decades after the FLSA. Energy Policy Act, 42 U.S C. § 5851(a)(1)(F) (1974), Clean Air Act, 42 U.S C. § 7622 (1977) (amending the 1955 Act); ERISA, 29 U S.C § 1140(a) (1974); Migrant and Seasonal Agricultural Protection Act, 29 U.S.C § 1855(a) (1983) (protecting workers who "filed any complaint").

Respondent mistakenly infers legislative intent to limit the scope of section 215(a)(3) from language included in the temporary anti-retaliation provision in the FLSA Amendments of 1985, Pub. L. No. 99-150, § 8, 99 Stat. 791 (1985). Respondent's inference stems from an incomplete picture of the historical context of Public Law 99-150. In 1985, this Court held that the FLSA was applicable to states and municipalities. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). To "ease the fiscal transition for state and local governments newly subject to the Act, Congress passed amendments . . . postpon[ing] the effective date of the Act's application to April 15, 1986". *Blanton v. City of Murfreesboro*, 856 F.2d 731, 732 (6th Cir. 1988);

see also Christensen v. Harris County, 529 U.S. 576, 579 (2000). Section 8 was designed "to prohibit governmental discrimination against employees newly entitled to financial benefits" during the transition between February 19, 1985 and August 1, 1986. *Blanton*, 856 F.2d at 733. Pub. L. No. 99-150, § 8; *See* Joint Explanatory Statement of the Committee of Conference, *House Conference Report No. 99-357*, at 8-9. This provision prohibited retaliation against employees who "asserted coverage" under the Act. Pub. L. No. 99-150, § 8.

The "asserted coverage" language created broader protection for public employees than section 215(a)(3) during the transition. Employees did not need to make a "complaint" of to be protected; rather, employees who simply attempted to discuss how the FLSA could be implemented would be protected as "assert[ing] coverage." Section 8 also prohibited states and municipalities from downwardly adjusting the base wage rates of employees in an effort to offset the cost implementing the FLSA's minimum wage and overtime requirements. *Blanton*, 856 F.2d at 732. This is certainly not the kind of activity prohibited under section 215(a)(3). From a practical standpoint, it is difficult to imagine what employees would complain about during the most of the transitional period to receive section 215(a)(3) protection, since the FLSA did not actually become effective for these public entities until April 1986. After this transitional period was complete, the FLSA was to be fully in force, and public employees could complain of violations and obtain protection under section 215(a)(3) rather than needing the alternative coverage afforded under section 8. There is therefore no indication that Congress intended to limit the scope of the protections under section 215(a)(3) by discontinuing the heightened protections needed ensure a smooth transition for public employers.

Respondent next insists that the meaning of the term "filed" is "clear and unambiguous" on its face. Br. Opp. 5, 12. However, as the dissenting opinion below makes clear, the common usage of the term "file" is fairly broad, and certainly can include an oral statement. In these circumstances, the Department of Labor's consistent, reasonable interpretation of section 215(a)(3) is entitled to deference.[10] *Skidmore*

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[10] The panel declined to afford *Skidmore* deference, stating that Secretary's position "rest[ed] solely on a litigating position" App. 39 (citing *Smiley v. Citibank*, 517 U S 735, 741 (1996) and *Bowen v Georgetown Univ. Hosp.*, 488 U.S 204, 212 (1988)). The dissent disagreed:

> In *Auer v. Robbins*, 519 U S 452, 462 (1997), the Supreme Court [ruled] that the Secretary's position was worthy of deference even though advanced in litigation, [and] stated "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question" The Court contrasted the situation in *Bowen*, in which it rejected the Secretary of Health and Human Service's interpretation advanced in litigation because it was adopted

v. Swift & Co., 323 U.S. 134, 139-40 (1944). Since nothing in the statute indicates that a complaint must be "in writing", the Secretary's interpretation, which deems oral complaints to be protected activity under section 215(a)(3), is entitled to deference.

In sum, Respondent's injection of the phrase "in writing" into section 215(a)(3) of the FLSA is contrary to the language of the statute and evidence of Congressional intent. Because the Seventh Circuit's error not only creates a clear split among the circuits, but also causes difficulty in the enforcement of the FLSA and confuses interpretations of similar statutes, the petition for a writ of certiorari should be granted.

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there for the first time and was inconsistent with the Secretary's prior litigation positions The Secretary's position here was not adopted for the first time in her *amicus* brief. Nor is the position inconsistent with the Secretary's prior litigating positions Indeed, the Department has held the position since at least 1961 when it brought a section 15(a)(3) action on behalf of an employee who lodged an oral complaint. . . . Accordingly, there is no reason to suspect that the Secretary's interpretation "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462.

CONCLUSION

For the above reasons, a writ of certiorari should issue, or in the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

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JOINT
APPENDIX

Supreme Court, U.S.
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No. 09-834

In the Supreme Court of the United States

Kevin Kasten,
Petitioner,
v.
Saint-Gobain Performance Plastics Corporation,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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CLOSED, REASSIGN

U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #: 3:07-cv-00686-bbc

KASTEN v. SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION
Assigned to: District Judge Barbara B. Crabb
Referred to: Magistrate Judge Stephen L. Crocker
Case in other court: Seventh Circuit, 08-02820
Cause: 29:201 Fair Labor Standards Act

Date Filed: 12/05/2007
Date Terminated: 06/19/2008
Jury Demand: Plaintiff
Nature of Suit: 710 Labor: Fair Standards
Jurisdiction: Federal Question

Date Filed: 12/05/2007

#1 COMPLAINT against SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION (Filing fee $ 350 receipt number 64852), filed by KEVIN KASTEN. (Attachment: #(1) Civil Cover Sheet.) (llj) (lak). (Entered: 12/11/2007)

Standard attachments for Judge John C. Shabaz sent: NORTC, Briefing Guidelines, Corporate Disclosure Statement, JCS Order on Dispositive Motions. (llj) (Entered: 12/11/2007)

Summons Issued as to SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION. (llj) (Entered: 12/11/2007)

Date Filed: 12/07/2007

#2 SUMMONS Returned Executed by Plaintiff KEVIN KASTEN, Defendant SAINT-GOBAIN

PERFORMANCE PLASTICS CORPORATION. SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION served on 12/6/2007, answer due 12/26/2007. (llj) (Entered: 12/11/2007)

Date Filed: 12/26/2007

#3 ANSWER to Complaint by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION. (arw) (lak). (Entered: 12/26/2007)

* * *

Date Filed: 03/14/2008

#58 MOTION for Summary Judgment by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION. Brief in Opposition due by 4/4/2008.,Brief in Reply due by 4/14/2008. Associated Cases: 3:07-cv-00686-bbc, 3:07-cv-00449-bbc (Sievert, Anthony) (Entered: 03/14/2008)

#59 BRIEF in Support by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION re: (117 in 3:07-cv-00449-bbc, 58 in 3:07-cv00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION (Attachments: # 1 Certificate of Service) Associated Cases: 3:07-cv-00686-bbc, 3:07-cv00449-bbc (Sievert, Anthony) (Entered: 03/14/2008)

#60 Proposed Findings of Fact by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION re: (117 in 3:07-cv-00449-bbc, 58 in 3:07-cv00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-

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#61 AFFIDAVIT of Thomas Godar filed by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION re: (117 in 3:07-cv-00449- bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION (Attachments: #1 Exhibit September 12, 2007 DWD Complaint, 5pp. #2 Exhibit December 5, 2007 District Court Complaint, 6 pp.) Associated Cases: 3:07-cv-00686-bbc, 3:07-cv-00449-bbc (Sievert, Anthony) (Entered: 03/14/2008)

#62 AFFIDAVIT of Barbara Zabawa filed by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS COR-PORATION re: (117 in 3:07-cv-00449- bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS COR-PORATION (Attachments:

#1 Exhibit Excerpts of Deposition Transcript of Kevin Kasten and Exhibits, 54pp.

#2 Exhibit Excerpts of Deposition Transcript of Lani Williams, 6 pp.

#3 Exhibit Excerpts of Deposition Transcript of Dennis Brown, 4 pp.

#4 Exhibit Excerpts of Deposition Transcript of Dennis Brown, March 10, 2008, 3 pp.

#5 Exhibit Excerpts of Deposition Transcript of Mary Lou DeSimone, 3 pp.) Associated Cases: 3:07-cv-00686-bbc, 3:07-cv-00449-bbc (Sievert, Anthony) (Entered: 03/14/2008)

* * *

Date Filed: 04/04/2008

#83 Response to Proposed Findings of Fact by Plaintiffs KEVIN KASTEN, JAMES POOLE, STEVEN R. BENSON, KEVIN KASTEN re: (117 in 3:07- cv-00449-bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

#84 Proposed Findings of Fact by Plaintiffs KEVIN KASTEN, JAMES POOLE, STEVEN R. BENSON, KEVIN KASTEN re: (117 in 3:07-ev-00449-bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

#85 BRIEF in Opposition by Plaintiffs KEVIN KASTEN, JAMES POOLE, STEVEN R. BENSON, KEVIN KASTEN re: (117 in 3:07-cv-00449-bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

#86 CERTIFICATE OF SERVICE by Plaintiffs JAMES POOLE, KEVIN KASTEN re (76 in 3:07-cv-00686-bbc, 136 in 3:07-cv-00449-bbc) Brief in Opposition, (77 in 3:07-cv-00686-bbc, 137 in 3:07-cv-00449-bbc) Affidavit, (135 in 3:07-cv-00449-bbc, 75 in 3:07-cv-00686-bbc) Response to Proposed Findings of Fact, Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Clay, Jessica) (Entered: 04/04/2008)

#87 AFFIDAVIT of Adrianna S. Haugen filed by Plaintiffs KEVIN KASTEN, JAMES POOLE, STEVEN R. BENSON, KEVIN KASTEN re: (117 in 3:07- cv-00449-bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION (Attachments:

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#88 Exhibit to (147 in 3:07-cv-00449-bbc, 87 in 3:07-cv-00686-bbc) Affidavit, filed by STEVEN R. BENSON, JAMES POOLE, KEVIN KASTEN 1 (Sealed Document). Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

* * *

#90 Exhibit to (149 in 3:07-cv-00449-bbc, 89 in 3:07-cv-00686-bbc) Affidavit, filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION 9 (Sealed Document). Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc Haugen, Adrianna) (Entered: 04/04/2008)

#91 Exhibit to (147 in 3:07-cv-00449-bbc, 87 in 3:07-cv-00686-bbc) Affidavit, filed by STEVEN R. BENSON, JAMES POOLE, KEVIN KASTEN 10-12 (Sealed Document). Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

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#93 Exhibit to (147 in 3:07-cv-00449-bbc, 87 in 3:07-cv-00686-bbc) Affidavit, filed by STEVEN R. BENSON, JAMES POOLE, KEVIN KASTEN 25-34 (Sealed Document). Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

#94 Exhibit to (147 in 3:07-cv-00449-bbc, 87 in 3:07-cv-00686-bbc) Affidavit, filed by STEVEN R. BENSON, JAMES POOLE, KEVIN KASTEN 37 (Sealed Document). Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

#95 AFFIDAVIT of Shawn McCune filed by Plaintiffs KEVIN KASTEN, JAMES POOLE, STEVEN R. BENSON, KEVIN KASTEN re: (117 in 3:07-cv-00449-bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION (Sealed Document) (Attachments:

# 1 Exhibit) Associated Cases: 3:07-cv-00449-bbc, 3:07-cv-00686-bbc (Haugen, Adrianna) (Entered: 04/04/2008)

* * *

Date Filed: 04/15/2008

#127 BRIEF in Reply in Support re: (117 in 3:07-cv-00449-bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN

PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-cv- 00686-bbc, 3:07-cv-00449-bbc (Sievert, Anthony) (Entered: 04/15/2008)

#128 Reply to Proposed Findings of Fact by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION re: (117 in 3:07-cv-00449- bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-cv-00686-bbc, 3:07-cv-00449-bbc (Sievert, Anthony) (Entered: 04/15/2008)

#129 Response to Proposed Findings of Fact by Defendant SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION re: (117 in 3:07-cv-00449- bbc, 58 in 3:07-cv-00686-bbc) MOTION for Summary Judgment filed by SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION Associated Cases: 3:07-cv-00686-bbc, 3:07-cv-00449-bbc (Sievert, Anthony) (Entered: 04/15/2008)

* * *

Date Filed: 06/19/2008

#175 ORDER granting 58 Motion for Summary Judgment by defendant Saint-Gobain Performance Plastics Corporation. Signed by Judge Barbara B. Crabb on 6/18/08. (elc) (Entered: 06/19/2008)

#176 JUDGMENT entered dismissing case against defendant. (TMO /MFH) (elc) (Entered: 06/19/2008)

Date Filed: 07/17/2008

#177 NOTICE OF APPEAL by Plaintiff KEVIN KASTEN re 175 order and 176 judgment. Filing fee of

$ 455, receipt number 230918 paid. No Docketing Statement filed, (Attachments: #1 Certificate of Service) (Haugen, Adrianna) Modified on 7/21/2008 (Olson, Marlene). (Entered: 07/17/2008)

Date Filed: 07/18/2008

#178 Appeal Information Packet. (elc) (Entered: 07/18/2008)

Date Filed: 07/21/2008

Transmission of Notice of Appeal, Appeal Information Sheet, Docket Sheet and Judgment to US Court of Appeals re 177 Notice of Appeal. (mmo) (Entered: 07/21/2008)

Date Filed: 07/22/2008

USCA Case Number 08-2820 for 177 Notice of Appeal, filed by KEVIN KASTEN. (mmo) (Entered: 07/22/2008)

Date Filed: 07/28/2008

#179 DESIGNATION of Record on Appeal by Plaintiff KEVIN KASTEN re 177 Notice of Appeal, (Attachments: #1 Certificate of Service) (Haugen, Adrianna) (Entered: 07/28/2008)

* * *

Date Filed: 11/26/2008

#188 ORDER on Bill of Costs: Costs in the amount of $1,071.69 taxed in favor of Defendant. Signed by Joel W. Turner, Acting Clerk of Court on 11/21/2008. (arw) (Entered: 11/26/2008)

Date Filed: 01/16/2009

Appeal Record Prepared re 177 Notice of Appeal. (mmo) (Entered: 01/16/2009)

Date Filed: 01/26/2009

#189 Certified and Transmitted Record on Appeal to US Court of Appeals re 177 Notice of Appeal. (mmo) (Entered: 01/26/2009)

Date Filed: 02/03/2009

#190 Acknowledgment of Receipt of Original Record on Appeal by USCA. (elc) (Additional attachment(s) added on 3/5/2009: #1 7th Circuit notice that original record on Appeal received) (elc). (Entered:02/03/2009)

Date Filed: 10/23/2009

#191 JUDGMENT from USCA affirming district court with costs as to 177 Notice of Appeal, filed by KEVIN KASTEN. Record not returned. (Attachments: #1 Appellate Opinion, #2 Appellate Opinion denying rehearing, #3 Notice of Issuance of Mandate) (krj) (Entered: 10/23/2009)

Date Filed: 10/26/2009

Appeal Record Returned. (krj) (Entered: 10/26/2009)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Kevin Kasten,
Plaintiff,

Court File No. 07 C 0686 S

v.

COMPLAINT
(JURY TRIAL DEMANDED)

Saint-Gobain Performance Plastics Corporation,
Defendant.

Plaintiff, by his attorneys Nichols Kaster & Anderson PLLP, and Fox & Fox, S.C., brings this action for violations of the Fair Labor Standards Act. Plaintiff states the following against Defendant:

JURISDICTION AND VENUE

1. This action arises under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2007) ("FLSA"). Therefore, the Court has original jurisdiction to hear this complaint and to adjudicate the claims stated herein pursuant to 28 U.S.C. § 1331 (2007).

2. Venue is proper under 28 U.S.C. § 1391(b) because the events or omissions giving rise to the claims occurred in the Western District of Wisconsin.

PARTIES

3. Defendant Saint-Gobain Performance Plastics Corporation ("Defendant") is a corporation that manufactures a variety of structural and high-performance materials (ceramics, glass, plastics, silicone, etc.), with its principle place of business in Ohio and its registered address at 2664 Gilchrist Road, Akron, Ohio. Defendant operates a facility in Portage, Wisconsin.

4. Plaintiff Kevin Kasten ("Plaintiff") is an adult individual who resides in Portage, Wisconsin.

5. During all relevant times herein, Plaintiff was an "employee" of Defendant, and Defendant was Plaintiffs "employer" within the meaning of the FLSA.

FACTUAL ALLEGATIONS

6. Plaintiff Kevin Kasten worked at Defendant's Portage, Wisconsin facility from September, 2002 until Defendant terminated his employment in December, 2006. Plaintiff initially worked for Defendant as a Fabricator, but was promoted to a Mill Room Utility position, and later a Setup Utility position.

7. In all of the above positions, Plaintiff was an hourly employee of Defendant, and was required to clock-in prior to beginning his work shift and prior to resuming his work shift following lunch breaks. Plaintiff was required to clock-out at the end of his work shift and prior to commencing his lunch breaks.

8. Defendant located the time-clocks inside the shop area of the Portage, Wisconsin facility, beyond the employee entrance, employee locker rooms, and gowning areas of the facility.

9. Plaintiff and his coworkers performed unpaid work at the beginning of each shift before they were able to clock-in, and again before clocking back in after lunch breaks, including, but not limited to, donning protective gear and sanitizing their hands. Plaintiff and his coworkers also performed unpaid work before lunch and at the end of the scheduled shift, including, but not limited to, doffing the protective gear after clocking out.

10. In the Setup Utility position, Plaintiff was often stopped on his way to the time-clock by other employees needing his assistance, and as a result, he was late clocking-in due to handling other employees' requests. Because he was late clocking-in following a lunch break in late November, Defendant ordered Plaintiff's temporary disciplinary suspension.

11. In October and November 2006, Plaintiff told a Shift Supervisor, April Luther, that he was planning to seek legal counsel to pursue legal action based on Defendant's refusal to pay Plaintiff and his coworkers for time spent donning and doffing protective gear, and sanitizing their hands.

12. In approximately late November or early December 2006, Defendant held a meeting with Plaintiff to discuss his disciplinary suspension. In the meeting with Defendant, Plaintiff informed Human Resources Director Dennis Brown and others present that he believed it was illegal for Defendant to keep the time clock in the shop area and to deny earned wages to employees.

13. In approximately late November or early December 2006, Plaintiff also informed Human Resources Generalist, Lani Wruck, that the location of the time clocks and Defendant's denial of earned wages to employees were illegal.

14. Also in approximately late November or early December 2006, Plaintiff told Production Manager, Dennis Woolverton, and Shift Supervisor, April Luther, that if the location of Defendant's time clocks and Defendant's pay practices underwent legal challenge, "they'd lose."

15. In approximately early December 2006, Defendant's Human Resources Manager, Dennis

Brown, called Plaintiff and informed him that Defendant was going to terminate his employment.

16. Plaintiff later received a letter from Defendant stating that the effective date of his termination was December 11, 2006.

17. Defendant terminated Plaintiff's employment because he complained about and indicated his intent to pursue legal action on the basis of Defendant's alleged violations of the FLSA.

18. Plaintiff suffered damages as a result of Defendant's violations of the FLSA.

COUNT I

Violation Of The Fair Labor Standards Act

19. Plaintiff re-alleges Paragraphs 1 through 18 of this Complaint as if repeated completely.

20. Defendant violated the FLSA, 29 U.S.C. § 215(a)(3), by terminating Plaintiff's employment because Plaintiff made a complaint and indicated that he planned to take legal action against Defendant relating to Defendant's alleged violations of FLSA provisions, 29 U.S.C. §§ 206-207.

21. This violation occurred within the statutory period prescribed by 29 U.S.C. § 255(a).

22. Section 216(b) of the FLSA makes any employer who violates section 215(a)(3) liable for such legal and equitable relief as is appropriate to effectuate the purposes of that section, including without limitation, employment, reinstatement, promotion, the payment of lost wages as well as an additional equal amount as liquidated damages, costs, and attorney's fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Kevin Kasten prays for judgment against Defendant as follows:

1. Judgment against Defendant for an amount equal to Plaintiffs' back pay and front pay in lieu of reinstatement;

2. Damages for lost benefits;

3. An amount equal to lost wages as liquidated damages;

4. An award of prejudgment interest;

5. Costs and attorneys' fees; and

6. Such further relief as the Court deems equitable and just.

Dated: 12/3/07

NICHOLS KASTER & ANDERSON, PLLP

By s/____________________
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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KEVIN KASTEN,

Plaintiff,

Case No. 07-C-0686 S

vs.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES

Defendant Saint-Gobain Performance Plastics Corporation responds to Plaintiff's Complaint as follows:

JURISDICTION AND VENUE

1. Admits the allegations set forth in paragraph 1 of the Complaint.

2. Admits the allegations set forth in paragraph 2 of the Complaint.

PARTIES

3. Admits the allegations set forth in paragraph 3 of the Complaint.

4. Defendant is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of the Complaint.

5. Admits the allegations set forth in paragraph 5 of the Complaint.

FACTUAL ALLEGATIONS FOR ALL CLAIMS

6. Admits the allegations set forth in paragraph 6 of the Complaint.

7. Admits the allegations set forth in paragraph 7 of the Complaint.

8. Denies the allegations set forth in paragraph 8 of the Complaint.

9. Denies the allegations contained in paragraph 9 of the Complaint.

10. Responding to paragraph 10 of the Complaint, admits that Plaintiff was late clocking in following a lunch break in late November 2006 and was placed on disciplinary suspension. Further answering, denies the remaining allegations set forth in paragraph 10 of the Complaint.

11. Denies the allegations set forth paragraph 11 of the Complaint.

12. Responding to paragraph 12 of the Complaint, admits that in late November or early December 2006, Defendant held a meeting with Plaintiff to discuss disciplinary suspension. Further answering, denies the remaining allegations set forth in paragraph 12 of the Complaint.

13. Denies the allegations set forth in paragraph 13 of the Complaint.

14. Denies the allegations set forth in paragraph 14 of the Complaint.

15. Admits the allegations contained in paragraph 15 of the Complaint.

16. Defendant is without knowledge and information sufficient to form a belief as to the truth of

the allegations set forth in paragraph 16 of the Complaint, and on that basis denies same.

17. Denies the allegations set forth in paragraph 17 of the Complaint.

18. Denies the allegations set forth in paragraph 18 of the Complaint.

COUNT 1

Violation Of The Fair Labor Standards Act

19. Defendant adopts and re-alleges its responses to paragraphs 1 through 18 of the Complaint as fully set forth herein.

20. Denies the allegations set forth in paragraph 20 of the Complaint.

21. Denies the allegations set forth in paragraph 21 of the Complaint.

22. Neither admits or denies the allegation of paragraph 22 as the allegation is a conclusion of law for which no response is necessary, and denies the allegations contained in paragraph 22 of the Complaint to the extent that this paragraph alleges that Defendant violated federal law.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state claims upon which relief may be granted.

2. The Court lacks subject matter jurisdiction over some or all of Plaintiffs' claims.

3. The Complaint is barred, in whole or in part, as Plaintiff failed to exhaust administrative remedies.

4. The Complaint is barred, in whole or in part, as Defendant terminated Plaintiff's employment for

legitimate, non-pretextual reasons.

5. Plaintiff has failed to mitigate their damages, if any.

6. The Complaint is barred, in whole or in part, by release.

7. The Complaint is barred, in whole or in part, by waiver.

8. Defendant fulfilled its obligations under any agreements with plaintiffs.

9. Some or all of Plaintiff's claims are barred by the applicable statutes of limitations.

10. Some or all of Plaintiff's claims are barred by the doctrine of laches.

WHEREFORE, Defendant Saint-Gobain Performance Plastics Corporation denies that the Plaintiff is entitled to any of the relief sought in the Complaint and respectfully requests this Court dismiss the Complaint with prejudice, awarding it costs and reasonable attorneys' fees and granting such other relief as the Court deems appropriate.

Dated this 26th day of December, 2007.

Respectfully submitted,

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION

By: s/

Jeffrey A. McIntyre
Thomas P. Godar
Anthony J. Sievert
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legitimate, non-pretextual reasons.

5. Plaintiff has failed to mitigate their damages, if any.

6. The Complaint is barred, in whole or in part, by release.

7. The Complaint is barred, in whole or in part, by waiver.

8. Defendant fulfilled its obligations under any agreements with plaintiffs.

9. Some or all of Plaintiff's claims are barred by the applicable statutes of limitations.

10. Some or all of Plaintiff's claims are barred by the doctrine of laches.

WHEREFORE, Defendant Saint-Gobain Performance Plastics Corporation denies that the Plaintiff is entitled to any of the relief sought in the Complaint and respectfully requests this Court dismiss the Complaint with prejudice, awarding it costs and reasonable attorneys' fees and granting such other relief as the Court deems appropriate.

Dated this 26th day of December, 2007.

Respectfully submitted,

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION

By: s/ __________________

Jeffrey A. McIntyre
Thomas P. Godar
Anthony J. Sievert
Attorneys for Defendant

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED

JUN 16 2010

OFFICE OF THE CLERK

No. 09-834

In the Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S BRIEF

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QUESTION PRESENTED FOR REVIEW

Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?

PARTIES TO THE PROCEEDINGS

All parties to this Action are set forth in the Caption.

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Shea v. Vialpando, 416 U.S. 251 (1974) 33

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 64, 65

Smiley v. Citibank, 517 U.S. 735 (1996) 64

Sokos v. Hilton Hotels Corp., 283 F. Supp. 2d 42 (D.D.C. 2003) 24

Strickland v. MICA Info. Sys., 800 F. Supp. 1320 (M.D.N.C. 1992)................................ 55

Tennessee Coal, Iron & Railroad. Co. v. Muscoda Local 123, 321 U.S. 590 (1944) ... 40

Tiscornia v. Sysco Corp., No. CIV. A. 95-3178, 1997 WL 364279 (E.D. Pa. June 23, 1997) 23

United States v. Bent, 702 F.2d 210 (11th Cir. 1983).. 23

United States v. Biggs, 419 F. Supp. 2d 1277 (D. Mont. 2006)... 23

United States. v. Gonzales, 520 U.S. 1 (1997) 32, 33

United States v. McKinlay, 543 F. Supp. 462 (D. Or. 1980) 23

United States v. Rosenwasser, 323 U.S. 360 (1945) 35

Valerio v. Putnam Assocs., Inc., 173 F.3d 35 (1st Cir. 1999) 34, 52

Walker v. Washbasket Wash & Dry, No. CIV. A. 99-4878, 2001 WL 770804 (E.D. Pa. July 5, 2001) 56

Ward v. Housatonic Area Reg'l Transit Dist., 154 F. Supp. 2d 339 (D. Conn. 2001) 23

Wigley v. W. Fla. Lighting, Inc., No. 8:04CV1524T27TGW, 2005 WL 3312319 (M.D. Fla. Dec. 7, 2005) 56, 63

Wilke v. Salamone, 404 F. Supp. 2d 1040 (N.D. Ill. 2005) 43

Wittenberg v. Wheels, Inc., 963 F. Supp. 654 (N.D. Ill. 1997) 43

Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980 (4th Cir. 1993) 24

State Cases

Ashley v. Tri-State Lumber Co., 91 S.E. 813 (W. Va. 1917) 29

Commonwealth v. Molina, 346 A.2d 351 (Pa. Super. Ct. 1976) 28

Donovan v. Walsh, No. 287326, 2005 WL 1208964 (Mass. Land Ct. May 23, 2005) ... 28

Estate of Abdalian, No. 44137, 1982 WL 5386 (Ohio Ct. App. May 27, 1982) 28

In re McCort, 650 A.2d 504 (Vt. 1994) 28

Mid-Century Ins. Co. of Tex. v. Barclay, 880 S.W.2d 807 (Tex. Ct. App. 1994) 28

Parks v. Farmers Ins. Co. of Or., 227 P.3d 1127 (Or. 2009) 28

Richmond v. Newson, 17 So. 2d 635 (La. Ct. App. 1944) 28

Rocky v. King, 471 So. 2d 1006 (La. Ct. App. 1985) 28

State v. Howard, 805 So. 2d 1247 (La. Ct. App. 2002) 28

State v. Riggins, 508 So. 2d 918 (La. Ct. App. 1987) 28

Federal Administrative Cases

Bethlehem Temple Learning Ctr., No. 9-CA-35206, 1998 WL 1985138 (N.L.R.B. Div. of Judges Aug. 20, 1998) 26

Danuta Wincentyna Urban, No. A077 646 888, 2009 WL 3250467 (B.I.A. Sept. 22, 2009) .. 26

Dinndorf v. Potter, No. 01A20506, 2003 WL 21686770 (E.E.O.C. Dec. July 10, 2003) 25

Don Bassette Aviation, Inc., No. CP05GL0002, 2006 WL 728858 (D.O.T. Mar. 17, 2006) ... 26

Dotson v. Anderson Heating & Cooling, Inc., No. 95-CAA-11, 1995 WL 870105 (D.O.L O.A.L.J. Oct. 2, 1995) (Di Nardi, Arb.) 25

E. Ky. Paving Corp., 293 N.L.R.B. 1132 (1989) 25-26

Fairchild Air Force Base, No. 96 F.S.I.P. 44 ... 25

Guy v. Am. Airways, Inc., 4 N.T.S.B. 886 (1983 26

Mic Bruce, Inc. v. Chiquita Brands, Inc., 45 Agric. Dec. 1215 (1986) 25

Motor Convoy, Inc., 252 N.L.R.B. 1253 (1980), *enforcement den. by* 673 F.2d 734 (4th Cir. 1982) 25

Nor-Cal Beverage Co., 330 N.L.R.B. 610, (2000) 61

Seetharaman v. Stone & Webster, Inc., Arb. No. 06-024, 2007 WL 2573640 (Aug. 31, 2007) (D.O.L. Adm. Rev. Bd. Arb.) 26

Rollins v. Am. Airlines, Inc., Arb. No. 04-140, 2007 WL 1031362 (Apr. 3, 2007) (D.O.L. Adm. Rev. Bd., Arb.) 25

Sec'y of Labor v. Haysite, 1982 O.S.H.D (CCH) P 25917 (Occ. Safety & Health Rev. Comm'n 1982) 26

Sec'y of Labor v. Indep. Cement Corp., 2 F.M.S.H.R.C. 2329 (1980) 26

Sec'y of Labor v. Ormet Corp., No. 76-4397, 1978 WL 6690 (O.S.H.D. May 18, 1978) 26

Sw. Elec. Co-op. Inc., 274 N.L.R.B. 922 (1985) 26

U.S. Patent & Trademark Office, 45 F.L.R.A. 1090 (1992) 25

Federal Statutes

2 U.S.C. § 437g(a)(1) 39

5 U.S.C. § 3330a(a)(2)(B) 39

5 U.S.C. § 7116(a)(4) 21

7 U.S.C. § 193(a) 39

7 U.S.C. § 228b-2(a) 39

7 U.S.C. § 1599(a) 39

15 U.S.C. § 80b-9(a) 39

19 U.S.C. § 2561(a) 39

22 U.S.C. § 4115(a)(4) 21

28 U.S.C. § 1254(1) 1

29 U.S.C. § 158(a)(4) 36

29 U.S.C. § 210(a) 37, 38

29 U.S.C. § 203(l) 42

29 U.S.C. § 211(a) 54, 55

29 U.S.C. § 212(a) 42

29 U.S.C. § 213(a)(1) 42

29 U.S.C. § 214(c)(5)(A) 37, 38

29 U.S.C. § 215(a)(3). .... *passim.*

29 U.S.C. § 216(b) 38

29 U.S.C. § 623(d) 45

29 U.S.C. § 660(c)(1) 21

29 U.S.C. § 1855(a) 21

29 U.S.C. § 2002(4)(A) 21

29 U.S.C. § 2934(f) 21

33 U.S.C. § 392..39

38 U.S.C. § 4322(b) 39

42 U.S.C. § 2000b(a) 39

42 U.S.C. § 2000c-6(a) 39

42 U.S.C. § 2000e-3(a) 45, 46

42 U.S.C. § 2000e-5(b) 45

42 U.S.C. § 3610(a)(1)(A)(ii) 39

42 U.S.C. § 15512(a)(2)(C) 39

47 U.S.C. § 554(g) 39

49 U.S.C. § 20109(a)(3) 21

49 U.S.C. § 31105(a)(1)(A)(i) 21-22, 24

49 U.S.C. § 46101(a)(1) 39

State Statutes

N.Y. Energy Law app. § 7904.2 (McKinney 2009) 27

Minn. Stat. Ann. § 144.4807 (West 2010)........ 27

Miss. Code Ann. § 69-47-23(4) (West 2009)..... 27

Nev. Rev. Stat. Ann. § 618.705 (West 2009).... 27

N.J. Stat. Ann. § 30:4C-12 (West 2010)........... 27

Tenn. Code Ann. § 49-6-3401(c)(4)(B) (West 2010).. 27-28

Federal Regulations

14 C.F.R. § 1.1 25

29 C.F.R. § 1626.7(b)(3) 25, 62

42 C.F.R. § 438.402(b)(3) 25

State Regulations

Exec. Order No. 8, 13 Del. Reg. Regs. 422 (Sept. 1, 2009) 28

La. Admin. Code tit. 22, pt. § 308(E)(1)(a) (2009) 28

02-385-370 Me. Code r. § 2 (2007) (Weil 2007) 28

Utah Admin Code r. 477-15-4(2) (2009) 28

Other Authorities

5 Franklin D. Roosevelt, et al., *Public Papers and Addresses of Franklin D. Roosevelt* (Random House 1938) (1936) 15-16

6 Franklin D. Roosevelt, et al., *Public Papers and Addresses of Franklin D. Roosevelt* (Random House 1938) (1936) 16

Amy's Robot, *available at* http://amysrobot.com/archives/2002/07/we_all_know_zacharias_moussaoui.php (July 19, 2002 08:53) 29

Brief for Equal Employment Opportunity Commission as Amicus Curiae Supporting Appellees, Lambert v. Ackerley, 180 F.3d

997, (Nos. 96-36017, 96-36266, and 96-36267)..51-52

Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part, Kilpatrick v. Serv. Merch., Inc., 1998 WL 865217 (E.D. La. Dec. 14, 1998) (No. Civ. A. 98-990) 56

Ctrs. for Medicare & Medicaid Servs., *How to File a Complaint*, CMS Pub. No. 11313 (May 2007), *available at* http://www.medicare.gov/Publications/Pubs/pdf/11313.pdf..27

Comm. on Econ. *Sec., Social Security in America*, Reports & Studies (May 16, 1935), *available at* http://www.socialsecurity.gov/history/reports/ces/cesbookc17.html (last visited June 11, 2010)..41-42

Dep't of Labor Wage & Hour Division, FLSA Minimum Wage Poster, http://www.dol.gov/whd/regs/compliance/posters/flsa.htm (list visited June 10, 2010)..... 47

Equal Employment Opportunity Comm'n, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by

Superiors, No. 915.002, 1999 WL 33305874 (June 18, 1999) 30

Equal Employment Opportunity Comm'n, Equal Employment Opportunity Is the Law, EEOC-P/E-1 (Nov. 2009), *available at* http://www.eeoc.gov/employers.upload/eeoc_self_print_poster.pdf (last visited June 12, 2010) 47

Fair Labor Standards Amendments of 1977: Hearings Before the Subcomm. on Labor of the Comm. on Human Resources, 95th Cong. (1977) 48

F.B.I, Fraud Target: Senior Citizens, *available at* http://www.fbi.gov/majcases/ fraud/ seniorsfam.htm (last visited June 10, 2010) 26

Fed. Motor Carrier Safety Admin., Protect Your Move – Frequently Asked Questions (FAQ), *available at* http://protectyourmove.gov/ consumer/awareness/faq/faq.htm (last visited June 10, 2010) 26-27

Fed. Reserve Sys., "Federal Reserve Consumer Help," *available at* http://www.federalreserveconsumerhelp.gov/

ConsumerHelponline.pdf (last visited June 11, 2010) 27

H.R. Rep. No. 2738 (1938) (Conf. Rep.)..........48

H.R. Rep. No. 75-2738 (1938) (Conf. Rep.) 48

Hynnek v. Indianhead Council, Boy Scouts of Am., No. 69-1700-8740-2 (Minn. Dep't of Human Rights Aug. 1995), *available at* http://www.oah.state.mn.us/aljBase/17008740.or.htm (last visited June 12, 2010)......29

I.R.S., P.L.R. 8630019 (Apr. 23, 1986)............ 26

J. Redmong, *Are you Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision,* 42 Wm. & Mary L. Rev. 319 (2000).........................49-50

Pakistan's Musharraf Quits Amid Impeachment Threat (NPR radio broadcast Aug. 18, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=93710946&ft=1&f=1004........29

Patty Rhule, *Happy 100th Birthday, Edward R. Murrow,* Newseum (April 23, 2008), *available at* http://www.newseum.org/news/2008/04/happy-100th-birthday--edward-r-murrow.html (last visited June 12, 2010) 29

Tex. Dep't of Transp., Complaint Resolution Process, *available at* http://www.dot.state.tx.us/contact_us/complaints.htm (last visited June 10, 2010) 29

U.S. Dep't of Hous. & Human Dev., Housing Discrimination, *available at* http://portal.hud.gov/portal/page/portal/HUD/topics/housing_discrimination (last visited June 10, 2010) 27

U.S. Dep't of Justice, Addressing Police Misconduct, *available at* http://www.justice.gov/crt/split/documents/polmis.php (last visited June 11, 2010) 27

U.S. Dep't of Treasury, OIG Hotline, *available at* http://www.ustreas.gov/inspector-general/hotline.shtml (last visited June 11, 2010) 27

U.S. Envtl. Prot. Agency, How to File a Complaint or Allegation *available at* http://www.epa.gov/oig/hotline/how2file.htm (last visited June 11, 2010) 27

OPINIONS BELOW

The June 18, 2008, decision of the district court, which is reported at 619 F. Supp. 2d 608 (W.D. Wis. 2008), is set forth at pages 62–72 of the Petition Appendix. The panel decision of the Court of Appeals for the Seventh Circuit, which is reported at 570 F.3d 834 (7th Cir. 2009), is set forth at pages 32–43 of the Petition Appendix. The decision of the court of appeals denying rehearing and rehearing en banc, with three judges dissenting, is reported at 585 F.3d 310 (7th Cir. 2009), and is set forth at pages 1–14 of the Petition Appendix (hereinafter "P. App.").

STATEMENT OF JURISDICTION

The court of appeals issued its decision on June 29, 2009. The court of appeals denied a timely petition for rehearing and rehearing en banc on October 15, 2009. The petition for writ of certiorari was filed on January 12, 2010. This Court granted certiorari on March 22, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 215(a) provides in pertinent part:

> (a) . . . [I]t shall be unlawful for any person— . . .
>
> (3) to discharge or in any other manner

> discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

STATEMENT OF THE CASE

On June 29, 2009, the Seventh Circuit Court of Appeals affirmed the dismissal of Petitioner's retaliation claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), holding that his "unwritten, purely verbal complaints are not protected activity" because "the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing." (P. App. 43.) In light of the discrepancy between the Seventh Circuit's holding and other Circuits, the Department of Labor and Equal Employment Opportunity Commission's ("EEOC's") warnings that the decision will have a negative impact on enforcement of the FLSA, Equal Pay Act (EPA), and other federal laws, and the Seventh Circuit dissenting opinion recognizing that the decision is "contrary to the understanding of Congress," Plaintiff Kevin Kasten seeks review of this decision. (P. App. 2.)

I. Factual Background.

A. Kasten's Employment at Saint-Gobain Performance Plastics Corporation.

Plaintiff Kevin Kasten worked from October 2003 to December 11, 2006, for Defendant Saint-Gobain Performance Plastics Corporation at its Portage, Wisconsin, manufacturing plant. (P. App. 81.) Because of the nature of the materials used and the production processes at the plant, Defendant requires workers to wear company-supplied personal protective equipment ("PPE") while on the job. (*Id.* at 84–85.) That PPE gave rise to a dispute under the FLSA. (*Id.* at 85.)

B. The Donning and Doffing Dispute.

Manufacturing and production workers at the Portage plant are paid on an hourly basis. (*Id.* at 81.) To keep track of their time, Defendant requires these workers to punch in at the beginning of each shift and punch out at the end of each shift on a time clock. (*Id.* at 84–85.) They also punch out before and punch in after their unpaid meal breaks. (*Id.*)

During Kasten's tenure, Defendant stationed its time clocks beyond the designated donning and doffing area of the plant, so that workers could only punch in after they donned all of their PPE and could only punch out before they doffed all of their PPE. (*Id.*) Thus, the effect of the time clock locations was that workers were not paid for their donning and doffing activities completed at the start or end of each shift or over their meal breaks. (*Id.*) Since donning and doffing took between four and thirty minutes to complete per shift, Defendant routinely denied each individual worker between twenty minutes and 2.5 hours of pay per week, typically at overtime rates of pay. (*Id.* at 85.)

C. Kasten's Reporting Responsibilities.

Defendant maintains and enforces a Code of Ethics and Business Conduct, which declares, "[E]very employee has the responsibility to report known or suspected violations of the Code or any applicable law of which he or she becomes aware." (Dkt. # 91, Ex. 11.)

Defendant's Problem Resolution Procedure, located in its Employee Policy Handbook, sets forth the process for employees to report violations:

> At SGPPL, we . . . understand that you may have questions, complaints, and problems that need resolution. . . .
>
> When situations mentioned above occur, we suggest:

> - Contact your supervisor immediately
>
> -If you feel the situation is not resolved satisfactorily by your supervisor, you may take the issue to the next level of management
>
> - If this does not resolve the situation to your satisfaction, contact your local Human Resources Manager
>
> -If you still do not feel that your situation has been adequately resolved, contact your Regional Human Resources Manager or Headquarters Human Resources.

(*Id.*, Ex. 12 at 3.)

Defendant further explains that such complaints may be verbal:

> Company employees have the freedom to *speak* for themselves and *discuss* with all levels of management their concerns, suggestions, and problems. We .... will continue to *listen* and respond to the concerns and needs of our employees. . . .
>
> SGPPL's long standing open-door policy is based on our . . . belief that every person should have an opportunity to *discuss* any matter with someone besides his or her immediate supervisor. This policy offers the opportunity for every individual to *discuss* ideas and problems

> with any member of management . . . .
>
> Your supervisor is there to help you in any way possible. Your supervisor is responsible for . . . the proper administration of SGPPL's Human Resources policies including . . . wage administration.

(Dkt. # 93, Ex. 25 at 3 (emphasis added).)

Defendant's Code of Ethics and Business Conduct Guidelines provide an alternative vehicle for employees to raise oral complaints regarding legal violations:

> Code of Ethics and Business Conduct Hotline
>
> 1.800.548.2088 – USA Only
> 1.508.795.2736 – Worldwide
>
> * * *
>
> The Company's Hotline was established over a decade ago as one method for employees to report known or suspected Code violations or illegal or unethical activities. The Hotline is designed to receive reports from employees who might otherwise feel uncomfortable reporting the information to a supervisor, general manager or corporate, group or division officer.
>
> Employees who make such reports in

> good faith regarding another employee's violation should not fear any retaliation.

(Dkt. # 91, Ex. 11.)

Defendant's own policies use the term "report" interchangeably with the phrase "file a complaint" to refer to these verbal methods of bringing a suspected violation of law to Defendant's attention. (Dkt. # 93, Ex. 25 at 30.)

D. Kasten's Oral Complaints of FLSA Violations and Subsequent Termination.

As a long-term employee, Kasten was well-aware of his internal reporting responsibilities and the corporate policies describing the methods of reporting legal violations. From September to December 2006, Kasten followed the Problem Resolution Procedure to fulfill his obligations under the Code of Ethics. (P. App. 24 n.4.) He repeatedly reported up the chain of command to multiple supervisors, asserting that the location of Defendant's time clocks—which caused workers to remain uncompensated for their donning and doffing time—was unlawful.[1] Specifically, Kasten alleges that: (1) he told his Shift

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[1] Kasten explained that his conclusion that the company's action was illegal was based on "hearing about Wal-Mart, Tyson chicken, similarities between lawsuits that were done." (Dkt # 87, Ex. 5 at 119.)

Supervisor Dennis Woolverton that he believed the location of the time clocks was illegal, (Dkt. # 87, Ex. 5 at 124);[2] (2) he met with Human Resources Generalist Lani Wruck-Williams and informed her that he did not think it was legal for the time clocks to be where they were and "if they were challenged on it [in court], they would lose," (*id.* at 132–33);[3] (3) on several occasions, he informed his Lead Operator April Luther that the location of Defendant's time clocks was illegal, (*id.* at 127); (4) he also told Luther that he was considering "starting a lawsuit about the placement of the time clocks," (*id.* at 126); and (5) he told the Human Resources Manager Dennis Brown and the Operations Manager Steven Stanford that he believed the location of the time clocks was illegal and that if Defendant was challenged in court, it would "lose." (*Id.* at 130.)

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[2] Kasten explained: "I raised a concern stating how I thought it was illegal for the time clocks to be where they were. . . . It was zoned in on if it was legal or not. And he said there is a certain window of time that you have from the time you come in and start doing stuff to the time you punch in and how they were doing it wasn't illegal." (*Id.* at 124.)

[3] Wruck-Williams acknowledged that she "heard mentioning" that Kasten told someone at the company "that Saint-Gobain would lose if anyone took legal action with regard to the location of the time clocks or employees getting paid for donning and doffing time," although she denied that Kasten directly made that statement to her. (Dkt. # 87, Ex. 6 at 34.)

After Kasten issued complaints about FLSA violations to his supervisors, Defendant reprimanded him more often and more severely for infractions that were not previously problematic. (*Id.* at 163.) Before his first complaint about Defendant's FLSA violations, Kasten had no disciplinary action for almost seven months. (Dkt. # 93, Exs. 32, 33.) However, after Kasten began complaining, Defendant disciplined him six times within a span of only three months. (Dkt. # 92, Exs. 14, 15, 18, 20; Dkt. # 93, Exs. 32, 34.)

On December 6, 2006, Defendant's Operations Manager and Human Resources Manager summoned Kasten to a meeting to discuss possible disciplinary action. Shortly before the meeting, Shift Supervisor Dennis Woolverton counseled Kasten that if he would "just lay down and tell them what they want to hear, {they] can probably save [his] job." (Dkt. # 87, Ex. 5 at 111.) Kasten understood this to mean that he was at risk of being fired because he complained about Defendant's failure to pay workers for the time they spent donning and doffing PPE. (*Id.* at 147.) Kasten did not heed Woolverton's advice and instead complained yet again during the suspension meeting that the location of the clocks was "illegal and that if they were to be taken to court" they would "lose." (*Id.* at 130.)[4]

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[4] Stanford documented a portion of this conversation in

On December 8, 2006, while still on suspension, Kasten went to Defendant's Portage facility to retrieve his check, and spoke with Luther. (*Id.* at 134.) He informed her that he had "many things in the works." (*Id.*)[5] He also spoke with Wruck-Williams, and reminded her that Defendant had a "problem" with the location of the time clocks.[6] Kasten also contacted Shift Supervisor Mary Riley

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an e-mail to himself and Brown, which stated, "Kevin asked if the 'old locations' of the time clocks was a legal issue for the company. Dennis [Brown] did not answer his question but simply stated that the new location would be an improvement." (Dkt. # 92, Ex. 15.)

[5] Luther documented a portion of this conversation in an e-mail to Brown on December 8, 2006:

> Just wanted to drop a line to let you know that when Kevin Kasten came in this morning to pick up his check he made the comment to me that if he does get fired his name will be widely known as he has many things in the works. Take this for what ever [sic] it is worth but I thought you should know.

(Dkt. # 92, Ex. 16.)

[6] Wruck-Williams documented a portion of this exchange and sent it by e-mail to Brown, Plant Manager Dan Tolles, Stanford, and Human Resources Director Al Jones:

> Kevin went on to say well you know you have a problem. I said "what is my problem" he said your clocks are in the wrong spot.

(Dkt. # 92, Ex. 20.)

later that day, and asked whether she had seen any articles regarding wage and hour class action suits. (Dkt. # 87, Ex. 5 at 134.)[7] The Plant Manager, Human Resources Director, Human Resources Manager, and Human Resources Generalist were all informed of this inquiry and corresponded about Kasten's mention of a class action lawsuit just hours prior to his termination. (Dkt. # 92, Ex. 17.)

On December 11, 2006, Defendant finally placed new time clocks near the employee entrance to the plant so that workers would be paid for all of their donning and doffing time. (Dkt. # 91, Ex. 10.) That very same day, Defendant's upper-level management corresponded about Kasten's mention of a class action lawsuit and subsequently notified Kasten that his employment was terminated. (P. App. 34–35.) Although Defendant claimed that Kasten was terminated for time clock violations, other employees had the same number of time clock violations or more and were not terminated. (Dkt. # 92, Exs. 21, 22.)

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[7] Riley documented this conversation in an e-mail she sent to Brown, Wruck-Williams, and Stanford on December 9, 2006, which stated:

> Kevin Kasten called me here at work today about 3:45PM to ask me if I had read any articles here about a class action suit and punches. I told him I hadn't read anything here and said goodbye.

(Dkt. # 92, Ex. 17.)

E. The Donning and Doffing Lawsuit.

Kasten thereafter filed an FLSA collective and Rule 23 class action lawsuit on behalf of himself and the other hourly-paid manufacturing and production workers at the Portage plant. The United States District Court for the Western District of Wisconsin granted collective and class certification, denied Defendant's motion for decertification, and granted the plaintiffs' motion for affirmative summary judgment on a number of grounds. (P. App. 112.) Significantly, the district court held that Defendant was liable as a matter of law for its violations of the FLSA, due to its failure to pay the manufacturing and production workers at the Portage plant for their donning and doffing time as a result of the time clock locations. (*Id.*)[8]

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[8] The Rule 23 class and FLSA collective action was subsequently settled on behalf of approximately 156 opt-in collective class members and 768 Rule 23 class members for $1,425,000. Joint Mot. for Prelim. Approval for Settlement, Kasten v. St. Gobain Performance Plastics Corp. (W.D. Wis. Oct. 17, 2008) (No. 07-cv-0449-bbc).

II. Proceedings Below.

A. Summary Judgment in the District Court.

On December 3, 2007, Plaintiff filed the instant case, alleging that Defendant retaliated against him in violation of the FLSA by terminating his employment because he filed oral complaints and indicated that he planned to take legal action for Defendant's violations of the FLSA. (*See id.* at 63.) Defendant moved for summary judgment, arguing that Kasten's repeated complaints were not protected conduct and that it was therefore legal for Defendant to terminate his employment for making those complaints. Defendant argued that section 215(a) does not protect any complaints made by workers to their employers and also contended that section 215(a) in any event applies only to written, but not oral, complaints regardless of the forum. The district court granted Defendant's motion on the basis of its determination that, as a matter of law, oral complaints cannot be "filed" as the statute requires because they are not "committed to document form," and thus can never constitute protected conduct within the anti-retaliation provision of the FLSA. (*Id.* at 70–72.)

B. Decision on Appeal.

On June 29, 2009, a three-judge panel at the Seventh Circuit Court of Appeals did not give deference to Amicus Curiae Department of Labor's position and affirmed the judgment of the district court. (*Id.* at 39 n.2.) The panel held that informal intra-company complaints are protected but that unwritten oral complaints are not "filed" and therefore can never come within the protection of the FLSA anti-retaliation provision. (*Id.* at 38, 43.) The court acknowledged its disagreement with other circuits, which find that oral complaints to an employer are protected activity under the FLSA. (*Id.* at 41.) Nevertheless, the panel held: "One cannot 'file' an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place." (*Id.* at 39.)

C. Denial of Rehearing with Three Dissenting Judges.

Kasten thereafter sought rehearing, and the Secretary of Labor and the EEOC joined Plaintiff's position as Amici Curiae. (*See id.* at 17.) On October 15, 2009, the Seventh Circuit denied the petition, but three Judges issued a lengthy dissenting opinion. (*Id.* at 1–2.) The dissent stated:

> In deeming the statutory language to reach only written and not oral complaints, the court has taken a position contrary to the longstanding view of the Department of Labor, departed from the holdings of other circuits, and interpreted the statutory

> language in a way that I believe is contrary to the understanding of Congress.

(*Id.* at 2.) The dissent recognized a long list of statutes that include similar language and have been held to encompass protection for oral complaints. (*Id.* at 2–3.) It contrasted these statutes with another lengthy list of statutes in which Congress "specifically require[s] written complaints." (*Id.* at 7.) Since the Seventh Circuit's decision has such a broad impact on a variety of anti-retaliation provisions, which "serve to protect not just the individual worker, but the means by which federal agencies become aware of unlawful labor practices," the dissent determined that further consideration was warranted. (*Id.* at 3.)

D. Issuance of a Writ of Certiorari.

On March 22, 2010, this Court granted the petition for a writ of certiorari. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (2010).

SUMMARY OF ARGUMENT

In an effort to "eliminate[] child labor and long hours and starvation wages," which were running rampant during the Great Depression, president Roosevelt signed the FLSA into law on October 24, 1938. 5 Franklin D. Roosevelt, et al., *Public Papers* *and Addresses of Franklin D. Roosevelt* 624–25 (Random House 1938) (1936); 6 Roosevelt, *supra* at 214–16. Congress assigned Fair Labor Standards Act ("FLSA") enforcement responsibilities to the Department of Labor, and "[f]or weighty practical and other reasons, Congress did not seek to secure compliance [with the FLSA] with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Because "effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances," Congress included 29 U.S.C. § 215 in the Act, which prohibits retaliation against an employee who has "filed any complaint . . . under or related to" the FLSA. *Id.* In 1963, Congress passed the EPA, amending the FLSA to prohibit gender discrimination in the payment of wages. Employee complaints play a pivotal role under the Equal Pay Act ("EPA") as well, and retaliation for these complaints is also prohibited pursuant to 29 U.S.C. § 215.

More than seven decades later, the Seventh Circuit Court of Appeals issued the order in this case, stripping section 215(a)(3) of its effectiveness for a large proportion of the American workforce by limiting the application of the FLSA's anti-retaliation provision to only written complaints. The court held, contrary to six other courts of appeals, that the word "filed" in section 215(a)(3)'s phrase "filed any complaint" mandates "some sort of writing," and does not protect oral complaints. (P. App. 43.) Unfortunately, if the Seventh Circuit's decision is allowed to stand, it will silence the voice of employees aggrieved by violations of the Act, undermine the broad remedial purposes of the FLSA, and severely truncate the Department of Labor's and Equal Employment Opportunity Commission's enforcement efforts.

The Seventh Circuit's holding rests on the erroneous presumption that the verb "filed" can only have one possible definition—one which requires a physical document to be delivered to "its proper place." (P. App. 39, 70.) However, the term "filed" has many possible meanings, one of which allows for the filing of an oral matter by submitting the matter to a decision-maker for consideration. Courts, administrative agencies, and legislatures across the country regularly use the term "file" to refer to the oral conveyance of some form of notice, including "filing" oral complaints, oral grievances, oral motions, or other matters. Both administrative agencies and corporations (including Defendant) frequently encourage employees and members of the public to file a complaint over the telephone by calling toll-free complaint hotlines. Private sector use of the term "filed" is likewise much broader than the Seventh Circuit decision acknowledges; it is regularly used in a manner synonymous with "submitted," as in the context of radio or televised news reports. Thus, at least one possible definition of the term "filed" encompasses oral complaints.

Although the proper definition of the term "filed" may not be obvious when the word stands alone, the true meaning of the word "filed" as used in 29 U.S.C. § 215(a)(3) is apparent when it is considered in context. The textual context of section 215(a)(3) and the historical and substantive context of the FLSA as a whole make clear that the definition applicable to the term "filed" in section 215(a)(3) is the definition which contemplates the filing of oral complaints.

Congress enacted the FLSA with a broad remedial and humanitarian purpose in mind, choosing to rely on employee complaints for enforcement purposes. In so doing, Congress used the word "any" in the text of section 215(a)(3) six times to emphasize the intent to provide broad protection for individuals who were willing to come forward to report violations of the FLSA. Specifically, Congress stated that "any complaint" was protected in 29 U.S.C. § 215(a)(3), which would seem to encompass oral complaints on its face.

Additionally, Congress was aware that at the time the FLSA was enacted, the vast majority of workers were Depression-era blue collar physical laborers who were extremely unlikely to write down their complaints to hand to their supervisors or the Department of Labor, but were far more likely to verbally convey violations. It is also highly unlikely that Congress intended to exclude from section 215(a)(3)'s protection illiterate, blind, or non-English-speaking workers who would be unable to file a written complaint. Since these are populations the FLSA was designed to protect, eliminating anti-retaliation coverage for individuals who issue oral complaints in these population groups makes enforcement efforts nearly impossible.

If employees are aware that they run the risk of termination by attempting to problem-solve with their employers informally, rather than becoming their employers' formal antagonist by filing a written complaint of FLSA violations, they will be far less likely to report violations at all faced with fear of losing their whole income in an effort to recover the portion unlawfully withheld. Employees' contacts with the Department of Labor and EEOC will also be unprotected, if they follow instructions on the federally-mandated posters on the wall in break rooms and offices across the country, which instruct workers to call a toll-free hotline to report violations. Thus, the Seventh Circuit's rendition of the word "filed" runs counter to the broad remedial purposes of the FLSA, enfeebles enforcement efforts, and discourages productive internal problem-solving between employers and employees in favor of creating an unnecessary bureaucratic enforcement nightmare.

Even if the textual, historical, and practical context of 29 U.S.C. § 215(a)(3) do not make clear that the term "filed" encompasses oral complaints, the EEOC's interpretations should be afforded deference. There is an established difference of opinion between the Seventh Circuit and the six other circuits that have evaluated whether oral complaints are protected. Either the Seventh Circuit completely missed the mark, and "filed" clearly and unambiguously encompasses oral filings, or there is some level of ambiguity. In the event that the term is ambiguous, the Department of Labor and EEOC are permitted to interpret the term consistent with the intent of Congress. These agencies are in accord that oral complaints are protected activity under 29 U.S.C. § 215(a)(3). Thus, the summary judgment decision should be reversed, and this case should be remanded for trial.

ARGUMENT

I. THE TERM "FILED" HAS MULTIPLE MEANINGS, AND MAY INCLUDE ORAL FILINGS.

The Seventh Circuit's decision rests on a single mistaken premise: that "[o]ne cannot 'file' an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place." (P. App. 39, 70.) As a result of this interpretation, the court determined that the verb "filed" used in the phrase "filed any complaint" unambiguously requires a writing, and therefore "any complaint" can *never* encompass oral complaints under 29 U.S.C. § 215(a)(3).[9] (P. App. 43.) The court based its narrow interpretation of section 215(a)(3) on one definition of the word "file" found in a single dictionary, and denied deference to the Secretary of Labor's longstanding interpretation on the grounds that the Secretary's chosen definition "to submit" "seems to us overbroad." (*Id.* at 39.)

In fact, the usage which the court below thought to be nonsense is quite common. "Filed" is a word with many meanings—not a term that "has some intrinsically plain meaning." *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 344 n.4 (1997); *see also Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 19 (1st Cir. 1998) (noting that the phrase "filed a complaint or begun a proceeding" in 49 U.S.C. §

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[9] There are a number of other major federal employment statutes that incorporate anti-retaliation provisions that include similar language to prohibit retaliation against a worker who "filed any complaint." *See, e.g.*, Federal Sector Labor Management Relations Program, 5 U.S.C. § 7116(a)(4); Foreign Service Labor-Management Relations, 22 U.S.C. § 4115(a)(4); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a); Employee Polygraph Protection Act, 29 U.S.C. § 2002(4)(A); Workforce Investment Act, 29 U.S.C. § 2934(f); Railway Labor Act, 49 U.S.C. § 20109(a)(3); Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1)(A)(i). According to the decisions below, oral complaints under these statutes would also be no longer considered protected conduct.

31105(a)(1)(A) "is susceptible to more than one reading"). For example, "filed" can refer to the submission of something to a person or body with authority to consider and perhaps act on that submission, such as the filing of an application.[10] Alternatively, it may denote, for example, the act of a journalist in providing a story to a news organization.[11] As the Department of Labor pointed out, "file" may also mean "submit." (*See* P. App. 39.) None of these practical uses are limited to documents.

When this issue first arose half a century ago, a federal court agreed with the position of the Secretary of Labor that "filed any complaint" could include an oral complaint. *Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, ¶ 40,986 (D. Utah 1961). The court explained, "in the colloquial, 'file' often is used interchangeably with 'lodge' and sometimes with 'communicate.'" *Id.* Since that time, courts, legislatures, and administrative agencies across the country have continued to adopt this rendition of the word.

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[10] (P. App. 58–59 (*citing New Shorter Oxford English Dictionary* 947 (1993) (defining "file" as "[to] submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority"); *Random House College Dictionary* 493 (1982) (defining "file" as "[t]o submit (an application, petition, etc."); *American Heritage Desk Dictionary* 369 (1981) (defining "file" as "to present for consideration")).)

[11] (P. App. 114); *see also American Heritage Dictionary* 658 (4th ed. 2000) (defining "files" as "3. To send or submit (copy) to a newspaper. 4. To carry out the first stage of . . ."); *American Heritage Dictionary of the English Language* 490 (1969) ("To send or submit (copy) to a newspaper or the like: especially to transmit by wireless").

The federal courts commonly refer to the "filing" of an oral complaint,[12] an oral motion,[13] and an oral grievance.[14] Judge Flaum himself, the author of the Seventh Circuit panel opinion in the instant case, referred in an earlier opinion to the filing of oral grievances. *NLRB v. Sw. Elec. Co-op., Inc.*, 794 F. 2d 276, 279 (7th Cir. 1986) (sustaining NLRB's finding that collective bargaining agreement included "the right to file oral grievances"). Only three months before the decision below, another panel of the Seventh Circuit itself observed in another case that "[the plaintiff] filed an oral report with [her supervisor], who was authorized to handle such complaints." *Harp v. Charter Commc'ns, Inc.*, 558 F. 3d 722, 725 (7th Cir. 2009). Retaliation claims based on oral complaints also arise and have been sustained by several circuits under the anti-retaliation provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105(a)(1)(A)(1), which (like section 215(a)) protects individuals who "filed a complaint." *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th

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[12] *Ward v. Housatonic Area Reg'l Transit Dist.*, 154 F. Supp. 2d 339, 351 (D. Conn. 2001) ("any written or oral complaints . . . were protected"); *Rallis v. Holiday Inns, Inc.*, 622 F. Supp. 63, 65 (N.D. Ill. 1985) ("Plaintiffs . . . had filed more than 20 oral and written complaints"); *Adams v. Indiana*, No. IP 82-55-C, 1983 WL 1992, at *1 (S.D. Ind. Apr. 4, 1983) ("[T]he plaintiff orally filed a supplemental complaint to which the defendant filed its oral answer."); *Marshall v. Wallace*, No. 77-693, 1978 WL 18639, at *3 (M.D. Pa. Dec. 22, 1978) ("[Workers] were discharged because they had orally filed a complaint with their employer."); *see also* (P. App. 58 (*quoting Marshall v. Power City Elec., Inc.*, No. 77-197, 1979 WL 23049, at *1–2 (E.D. Wash. Oct. 23, 1979) ("The Court further holds that the term 'filed' as used in this clause means 'lodged' and is not limited to a written form of complaint.").)

[13] *United States v. Bent*, 702 F.2d 210, 212 (11th Cir. 1983) ("appellant orally filed a motion"); *United States v. Biggs*, 419 F. Supp. 2d 1277, 1279 (D. Mont. 2006) ("the motions . . . were filed orally"); *Nat'l Football League v. Cousin Hugo's, Inc.*, 600 F. Supp. 84, 87 (E.D. Mo. 1984) ("motions to dismiss filed orally"); *United States v. McKinlay*, 543 F. Supp. 462, 463 (D. Or. 1980) ("Defendant orally filed a Rule 12.2 insanity notice and a motion for continuance . . . ."); *Tiscornia v. Sysco Corp.*, No. CIV. A. 95-3178, 1997 WL 364279, at *1 n.1 (E.D. Pa. June 23, 1997) ("plaintiff orally filed his motion"); *In re Mercado-Jimenez*, 193 B.R. 112, 114 (D.P.R. 1996) ("Debtor orally filed a motion").

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[14] *Buckner Corp. v. NLRB*, 401 F.2d 910, 914 (9th Cir. 1968) ("[worker] filed no oral grievances after March 3, 1965."); *Sokos v. Hilton Hotels Corp.*, 283 F. Supp. 2d 42, 53 n.6 (D.D.C. 2003) ("plaintiff . . . filed an oral grievance"); *Rodriguez v. Wolgast*, No. 85-4032-C, 1989 WL 60299, at *4 (D. Kan. May 8, 1989) ("plaintiff filed an oral grievance"); *Daiichiya-Love's Bakery v. ILWU, Local 142*, No. 84-1323, 1985 WL 5864, at *2 (D. Haw. May 3, 1985) ("The union representative then orally filed a grievance"); *Gettleman v. Werner*, 361 F. Supp. 278, 280 (W.D. Pa. 1973) ("plaintiff . . . filed an oral grievance").

Cir. 1987).

In the administrative realm, federal agencies regularly use the term "file" to refer to the oral conveyance of some form of notice. Several federal regulations provide that a person may "file" oral communications.[15] A number of federal administrative decisions also refer to the "filing" of an oral complaint,[16] an oral grievance,[17] an oral motion,[18] or other matters.[19] A number of federal agencies even invite members of the public to file a complaint over the telephone.[20]

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[15] *See, e.g.*, 14 C.F.R. § 1.1 ("flight plan . . . is filed orally or in writing with air traffic control"); 29 C.F.R. § 1626.7(b)(3) ("Oral charges filed in person or by telephone [shall be deemed filed on the d]ate of oral communication received by Commission."); 42 C.F.R. § 438.402(b)(3) (explaining that certain entities must have procedures that permit enrollee to "file a grievance orally or in writing" and to "file an appeal either orally or in writing").

[16] *Mic Bruce, Inc. v. Chiquita Brands, Inc.*, 45 Agric. Dec. 1215, 1242 (1986) ("complainant did not file an oral complaint . . . until May 11, 1983"); *Rollins v. Am. Airlines, Inc.*, Arb. No. 04-140, 2007 WL 1031362, at *3 n.11 (Apr. 3, 2007) (DOL Admin. Rev. Bd., Arb.) (claimant "filed a timely oral complaint"); *Dotson v. Anderson Heating & Cooling, Inc.*, No. 95-CAA-11, 1995 WL 870105, at *4 (DOL O.A.L.J. Oct. 2, 1995) (Di Nardi, Arb.) ("Complainant testified that he filed an oral complaint"); *Motor Convoy, Inc.*, 252 N.L.R.B. 1253, 1257 (1980) (employee "filed . . . many oral complaints"), *enforcement den. by* 673 F.2d 734 (4th Cir. 1982).

[17] *Dinndorf v. Potter*, No. 01A20506, 2003 WL 21686770, at *3 (E.E.O.C. Dec. July 10, 2003) ("oral grievances filed"); *U.S. Patent & Trademark Office*, 45 F.L.R.A. 1090, 1096 (1992) ("oral grievance filed [by complainant]"); *Fairchild Air Force Base*, 96 F.S.I.P. 44 (1996) (union proposal to "permit employees to file oral grievances"); *E.*

Ky. Paving Corp., 293 N.L.R.B. 1132, 1133 (1989) (worker "filed an oral grievance"); *Sw. Elec. Co-op., Inc.*, 274 N.L.R.B. 922, 925 (1985) ("[union steward] filed an oral grievance").

[18] *Don Bassette Aviation, Inc.*, No. CP05GL0002, 2006 WL 728858 (D O.T. Mar. 17, 2006) ("Respondent filed oral Motions to dismiss"); *Sec'y of Labor v. Indep. Cement Corp.*, 2 F.M.S.H.R.C. 2329 (1980) ("an oral motion to dismiss filed at hearing"); *Danuta Wincentyna Urban*, No. A077 646 888, 2009 WL 3250467, at *1 (B.I.A. Sept. 22, 2009) ("respondent filed an oral motion"); *Bethlehem Temple Learning Ctr., Inc.*, No. 9-CA-35206, 1998 WL 1985138 (N.L.R.B. Div. of Judges Aug. 26, 1998) ("Respondent's oral motion"); *Sec'y of Labor v. Haysite*, 1982 O.S.H.D. (CCH) P 25917 (Occ. Safety & Health Rev. Comm'n 1982) ("Respondent . . . filed its oral motion"); *Sec'y of Labor v. Ormet Corp.*, No. 76-4397, 1978 WL 6690 (O.S.H.D. May 18, 1978) (two motions "were filed orally at the commencement of the trial").

[19] *Seetharaman v. Stone & Webster, Inc.*, Arb. No. 06-024, 2007 WL 2573640, at *3 (Aug. 31, 2007) (D.O.L. Adm. Rev. Bd., Arb.) ("complainant filed charge orally"); *Guy v. Am. Airways, Inc.*, 4 N.T.S.B. 886, 887 n.3 (1983) ("notice of appeal was filed orally"); I.R.S., P.L.R. 8630019 (Apr. 23, 1986) ("the nurses regularly file oral . . . reports").

[20] *See, e.g.*, F.B.I., Fraud Target: Senior Citizens, http://www.fbi.gov/majcases/fraud/seniorsfam.htm (last visited June 10, 2010) ("file a complaint . . . by calling HUD's Hotline"); Fed. Motor Carrier Safety Admin., Protect Your Move—Frequently Asked Questions (FAQ), http://www.protectyourmove.gov/consumer/awareness/fa

Likewise, at the state level, there is a litany of statutes,[21] regulations,[22] and judicial

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q/faq.htm (last visited June 10, 2010) ("File a complaint . . . by dialing the TOLL FREE number"); U.S. Dep't of Hous. & Human Dev., Housing Discrimination, http://portal.hud.gov/portal/page/portal/HUD/topics/housing_discrimination (last visited June 11, 2010) ("There are several ways to file a [housing discrimination] complaint: . . . . You can call toll-free . . . ."); U.S. Dep't of Justice, Addressing Police Misconduct, http://www.justice.gov/crt/split/documents/polmis.php (last visited June 11, 2010) ("If you would like to file a complaint . . . call the Disability Rights Section's toll-free ADA Information Line . . . ."); U.S. Dep't of Treasury, OIG Hotline, http://www.ustreas.gov/inspector-general/hotline.shtml (last visited June 11, 2010) ("How to File Your Complaint . . . Telephone 1-800-359-3898."); U.S. Envtl. Prot. Agency, How to File a Complaint or Allegation, http://www.epa.gov/oig/hotline/how2file.htm (last visited June 11, 2010) ("How to File a Complaint . . . Toll-Free: 1-888-546-8740"); Fed. Reserve Sys., "Federal Reserve Consumer Help," *available at* http://www.federalreserveconsumerhelp.gov/ConsumerHelponline.pdf (last visited June 11, 2010) ("To file a complaint . . . Call us toll-free"); Ctrs. for Medicare & Medicaid Servs., "How to File a Complaint," CMS Pub. No. 11313 (May 2007), *available at* http://www.medicare.gov/Publications/Pubs/pdf/11313.pdf (last visited June 11, 2010) ("[F]ile a complaint either verbally or in writing.").

[21] Minn. Stat. Ann. § 144.4807 (West 2010) (allowing "application [to] be filed orally by telephone"); Miss. Code Ann. § 69-47-23(4) (West 2009) ("Any person . . . may file a written or oral complaint . . . ."); Nev. Rev. Stat. Ann. § 618.705 (West 2009) (imposing penalties on "[a]ny person who . . . files a false oral or written complaint"); N.J. Stat. Ann. § 30:4C-12 (West 2010) ("a written or oral complaint may be filed"); N.Y. Energy Law app. § 7904.2 (McKinney 2009) (stating action may be "initially filed orally"); Tenn.

decisions reaching back almost a century[23] that

Code Ann. § 49-6-3401(c)(4)(B) (West 2010) ("All appeals must be filed, orally or in writing").

[22] La. Admin. Code tit. 22, § 308(E)(1)(a) (2009) ("A request for accommodation may be filed orally . . . ."); 02-385-370 Me. Code R. § 2 (Weil 2007) ("Complaints may be filed orally . . . ."); Utah Admin. Code r. 477-15-4(2) (2009) ("An employee may file an oral or written complaint . . ."); *see also* Exec. Order No. 8, 13 Del. Reg. Regs. 422 (Sept. 1, 2009) ("An informal complaint is filed with Human Resource Management by written or oral communication").

[23] *State v. Howard*, 805 So. 2d 1247, 1256 (La. Ct. App. 2002) ("defendant's motion for continuance filed orally"); *Richmond v. Newson*, 17 So. 2d 635, 636 (La. Ct. App. 1944) ("right to file oral pleadings"); *State v. Riggins*, 508 So. 2d 918, 919 (La. Ct. App. 1987) ("State filed an oral multiple bill"); *Rocky v. King*, 471 So. 2d 1006, 1007 n.2 (La. Ct. App. 1985) (regarding whether defendant should have been permitted "to file oral exception"); *Donovan v. Walsh*, No. 287326, 2005 WL 1208964, at *2 (Mass. Land Ct. May 23, 2005) ("[D]efendants filed orally a motion."); *Estate of Abdalian*, No. 44137, 1982 WL 5386, at *1 (Ohio Ct. App. May 27, 1982) ("[C]laim . . . was filed orally"); *Parks v. Farmers Ins. Co. of Or.*, 227 P.3d 1127, 1131 (Or. 2009) ("Farmers suggests that the term 'filed' strongly implies a writing. But . . . we are not persuaded . . . Certainly car and unemployment insurance claims often are 'filed' orally by telephone, as are newspaper stories and ordinary complaints to businesses and government agencies."); *Commonwealth v. Molina*, 346 A.2d 351, 354 n.4 (Pa. Super. Ct. 1976) ("writ of coram nobis could be filed orally"); *Mid-Century Ins. Co. of Tex. v. Barclay*, 880 S.W.2d 807, 810 (Tex. Ct. App. 1994) (allowing a telephone call to be a "filed" claim, because "we understand the term 'filed' to refer to . . . providing . . . whatever notice was required"); *In re McCort*, 650 A.2d 504, 506 n.1 (Vt 1994) ("complaint . . . may be filed

use "file" to refer to oral complaints, grievances or other statements. Like their federal counterparts, a number of state government agencies also invite members of the public to file an oral complaint.[24]

The private sector's use of the term "filed" is no different. In the case of journalists, stories are "filed" orally by radio.[25] Private

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orally"); *Ashley v. Tri-State Lumber Co.*, 91 S.E. 813, 814 (W. Va. 1917) ("court permits such demurrer to be filed orally").

[24] *See, e.g.*, *Hynnek v. Indianhead Council, Boy Scouts of Am.*, No. 69-1700-8740-2 (Minn. Dep't of Human Rights Aug. 1995), *available at* http://www.oah.state.mn.us/aljBase/17008740.or.htm (last visited June 12, 2010); Tex. Dep't of Transp., Complaint Resolution Process, http://www.dot state.tx.us/contact_us/complaints.htm (last visited June 10, 2010).

[25] For example, "[Edward R.] Murrow filed his CBS radio reports from the rooftops of London as German bombs fell." Patty Rhule, *Happy 100th Birthday, Edward R. Murrow*, Newseum (Apr. 23, 2008), *available at* http://www.newseum.org/news/2008/04/happy-100th-birthday--edward-r-murrow.html (last visited June 12, 2010); Amy's Robot, http://amysrobot.com/archives/2002/07/we_all_know_zacharias_moussaou.php (July 19, 2002 08:53) ("NPR's Nina Totenberg, maybe the best Supreme Court reporter there is, filed this story . . . .") (providing link to audio recording); *Pakistan's Musharraf Quits Amid Impeachment Threat* (NPR radio broadcast Aug. 18, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=93710946&ft=1&f=1004 ("Philip Reeves is in the capital, Islamabad. He filed this story in reaction to Mr.

organizations, including Defendant, regularly use toll-free hotlines to handle complaints filed by employees and customers. (*See, e.g.*, Dkt. # 91, Ex. 11.)

In fact, Defendant's own policies use the phrase "filed a complaint" in a manner which encompasses oral complaints. The section in Defendant's Employee Handbook on "Sexual Harassment Policy and Procedures" advises company employees that "[r]etaliation directed at an employee who has ***filed a complaint*** or assisted in an investigation is strictly prohibited. (Dkt. # 93, Ex. 25 at 30 (emphasis added).) Surely this does not mean that Defendant forbids retaliation only against those sexual harassment victims who complain in writing, and actually permits retaliation against victims who complain orally.[26] Thus, even Defendant uses the term "filed" in its daily business practice in a manner which encompasses oral complaints.

Musharraf's resignation.").

[26] Such a rendition would likely run afoul of the *Faragher /Ellerth* requirement that employers exercise reasonable care to prevent and promptly correct any harassment, as well as Title VII's prohibition on retaliation, which encompasses oral complaints of harassment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Superiors, No. 915.002, 1999 WL 33305874 (June 18, 1999).

While use of the term "filed" with reference to oral matters in other contexts does not establish what the phrase "filed any complaint" means in the context of the FLSA, it does illustrate that that common usage of the term "filed" is fairly broad, and at least *can* refer to an oral statement.

II. THE TERM "FILED," AS USED IN SECTION 215(a)(3) OF THE FLSA, INCLUDES ORAL COMPLAINT FILINGS.

The Secretary's interpretation of the phrase "filed any complaint," which deems oral complaints to be protected activity under 29 U.S.C. § 215(a)(3), is the correct interpretation when the word "filed" is considered in context. A reading of the statute, which encompasses protection for employees making oral complaints, is consistent with the text of the statute itself, the broad remedial purposes of the Act, and well-established statutory rules of construction. This interpretation also effectuates the public policy considerations driving the FLSA, and makes practical application of the Act possible.

A. The Textual Context of Section 215(a)(3) Indicates that Oral Complaints Are Protected.

The meaning of the phrase "filed any complaint" in section 215(a)(3) lies in "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Of particular import here is congressional choice to use the word "any" to modify the noun "complaint," the lack of the phrase "in writing" to modify the verb "filed," and the practical realities of the application of the Act. Since there is no indication in the text that Congress intended only written complaints to be protected, and the statutory language indicates the opposite, oral complaints should be protected under section 215(a)(3).

1. Statutory Interpretation Should Give Force and Effect to the Word "Any."

The text of section 215(a)(3) indicates that the phrase "filed any complaint" includes the filing of an oral complaint. The adjective "any" emphatically gives the broadest possible meaning to the noun "complaint." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (*quoting Webster's Third New International Dictionary* 97 (1976)); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (commenting "any" is "expansive language"); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974) (stating "the normal meaning of the term 'any' [allows of] no limitation"). This Court has repeatedly treated "any" as precluding limitations on the matter which it modifies.[27]

In expressly holding that an "employee may communicate . . . allegations [of FLSA violations] orally or in writing" to receive protection under section 215(a)(3), the Ninth Circuit stated the truism "'[a]ny complaint' means 'any complaint.'" *Lambert v. Ackerley*, 180 F. 3d 997, 1004, 1007–08 (9th Cir. 1998); *see also Valerio v. Putnam Assocs., Inc.*, 173 F. 3d 35, 42 (1st Cir. 1999) ("[T]he word 'any' embraces all types of complaints . . . .").

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[27] *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130–31 (2002) (holding that "[a]ny drug-related criminal activity" applies even to activities that were unknown at the time); *Brogan v. United States*, 522 U.S. 398, 400–01 (1998) (prohibition against "any false . . . statement[]" includes false exculpatory "no"); *Gonzalezs*, 520 U.S. at 5 (stating that "any other term of imprisonment" applies to state as well as federal sentences); *Harrison*, 446 U.S. at 588–89 (stating that provision authorizing appellate review of "any . . . final action" included action in question); *Shea*, 416 U.S. at 260 (finding statutory deduction from income for "any expenses reasonably attributable to" earnings precluded placing fixed limitation on deductions that barred expenses above that ceiling); *NAACP v. New York*, 413 U.S. 345, 353 (1973) (holding that jurisdiction over "any appeal" includes appeal by unsuccessful intervenor); *Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U S. 487, 491 (1972) (finding that agreement to arbitrate "any difference" includes arbitration of dispute regarding laches); *Collector v. Hubbard*, 79 U.S 1, 15 (1870) (stating that "any court" includes state courts), *abrogated on other grounds by Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 627-28, 637 (1895).

Five other Courts of Appeals are in accord with *Ackerley*'s finding that "any complaint" protects any oral complaints under section 215(a)(3). (*See* P. App. 5, 18, 41, 68.) The Sixth Circuit holds that "it is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint." *EEOC v. Romeo Cmty Sch.*, 976 F. 2d 985, 989 (6th Cir. 1992); *see also Moore v. Freeman*, 355 F. 3d 558, 562 (6th Cir. 2004); *Moon v. Transp. Drivers, Inc.*, 836 F. 2d 226, 228 (6th Cir. 1987) (holding that oral complaints are protected under identical language in the STAA). The Eighth Circuit agrees, stating that an employee's oral "protest of what she believe[s] to be unlawful conduct on [the employer's] part [is] an act protected from reprisals." *Brennan v. Maxey's Yamaha, Inc.*, 513 F. 2d 179, 181 (8th Cir. 1975). The Eleventh Circuit has also held that oral complaints are protected by section 215(a)(3). *EEOC v. White & Son Enters.*, 881 F. 2d 1006, 1011 (11th Cir. 1989)

("[U]nofficial complaints . . . constitute an assertion of rights protected under the statute. . . . The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation . . . against an employee who chose to voice such a grievance."). The Fifth Circuit likewise recognizes that "any complaint" includes oral complaint filings. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617 (5th Cir. 2008) ("Section 215(a)(3) speaks of an employee 'fil[ing] any complaint,' and we cannot agree that the plain language is limited to filing a formal complaint."). Finally, the Tenth Circuit protects "an employee's unofficial assertion of rights under § 215(a)(3)," including an "employee's [oral] request for overtime wages." *Pacheco v. Whiting Farms, Inc.*, 365 F. 3d 1199, 1206–07 (10th Cir. 2004); *see also Love v. RE/MAX of Am.*, 738 F.2d 383 (10th Cir. 1984) ("When the 'immediate cause or motivating factor of a discharge is the employee's *assertion* of statutory rights, the discharge is discriminatory under § 215(a)(3) . . . .'" (emphasis added) (*quoting Maxey's Yamaha*, 513 F.2d at 181)).

Having given expansive scope to the actions protected by section 215(a)(3) by using the term "any," Congress could not have intended by using the term "filed" to impose some limitation on the form of complaint that is protected by mere implication. In *United States v. Rosenwasser*, this Court held that the use of the term "any" to modify "employee" in sections 203(a) and 207(a) of the FLSA "leaves no doubt as to the congressional intention to include all employees within the scope of the Act unless specifically excluded." 323 U.S. 360, 363 (1945). There is no such "specific[] exclu[sion]" of oral complaints from the scope of section 215(a)(3).

Congress' determination to accord expansive protection in section 215(a)(3) is reiterated throughout that provision. The term "any" appears six times in 29 U.S.C. § 215(a)(3). The law forbids retaliation by "any person," protects "any employee," applies to the action of instituting or causing to be instituted "any proceeding under or related to this chapter" as well as to testifying (or being about to testify) in "any such proceeding," and forbids not only retaliatory discharges but discrimination "in any other manner." *Id.* It seems particularly unlikely that Congress, having repeatedly stated its intent to broadly protect against reprisals, could have intended the courts to read in any implied exceptions.

This Court has rejected similar arguments in the past when litigants advocated for a statutory construction that would severely limit the scope of protection for employees in the face of congressional intent to afford broad protection under an act. For example, in *NLRB v. Scrivener*, 405 U.S. 117 (1972), this Court broadly construed section 8(a)(4) of the National Labor Relations Act, which forbids an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4). Like the term "any" in this case, this Court held that the term "otherwise" demonstrated that the statute was to be broadly construed.

On textual analysis alone, the presence

> of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee.

Scrivener, 405 U.S. at 122. That argument applies with particular force here because, while the term "otherwise" in section 8(a)(4) only defined the types of retaliatory action forbidden, the term "any" in section 215(a)(3) delineates the type of conduct (filing a complaint) that the FLSA protects.

2. Statutory Interpretation Should Duly Consider the Conspicuous Absence of the Phrase "in Writing" in the Context of the Act.

Had the framers of the FLSA wished to limit section 215(a)(3) to written complaints, they would undoubtedly have said so in just those terms. Three other provisions of the FLSA itself expressly require that something be "written" or "in writing." Section 210(a) provides that judicial review of an order of the Secretary under section 208 may be obtained "by *filing* in [the specified court] a *written* petition praying that the order of the Secretary be modified or set aside in whole or in part." 29 U.S.C. § 210(a) (emphasis added). Section 214(c)(5)(A) states, regarding certain lawsuits, that "[n]o employee may be a party to any such action unless the employee or the employee's parent or guardian gives consent *in writing* to become such a party and such consent is *filed* with the Secretary." 29 U.S.C. § 214(c)(5)(A) (emphasis added). Similarly, section 216(b) provides that "[n]o employee shall be a party plaintiff to any such [civil] action [for unpaid wages or overtime pay] unless he gives his consent *in writing* to become such a party and such consent is *filed* in the court in which such action is brought." 29 U.S.C. § 216(b) (emphasis added).

Each of these provisions contains an express requirement of a written document despite the fact that they also require that the matter be "filed," the pivotal disputed term in section 215(a)(3). If Congress had intended or understood "filed" to mean "filed in writing," it would not have included the additional requirement of a written document in sections 210(a), 214(c)(5)(A) and 216(b). If "filed" invariably meant "in writing," it would be redundant to refer to the filing of a written document; it would mean "filed in writing a written document." At the very least such duplicative language would be uncommon. If "file" indeed could only mean "file a written document," it would make no sense to refer to filing something that is oral in nature. Thus, this repeated coupling of the word "filed" with the express limitation of material "in writing" in the FLSA is highly probative of congressional intent behind the absence of the word "written" in section 215(a)(3). As the Seventh Circuit dissent explained, "[I]t is noteworthy that Congress in many other statues has specifically required written complaints. . . . These statutes suggest that when Congress means to require that complaints take a written form, it sets forth that requirement expressly."[28] (P. App. 7.)

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[28] *E.g.*, 2 U.S.C. § 437g(a)(1) ("complaint shall be in writing"); 5 U.S.C. § 3330a(a)(2)(B) (same), 7 U.S.C. § 193(a) ("complaint in writing"); 7 U.S.C. § 228b-2(a) (same); 7 U.S.C. § 1599(a) (same); 15 U.S.C. § 80b-9(a) ("file with it a statement in writing"); 19 U.S.C. § 2561(a) (stating a federal agency may not consider a complaint unless the agency is informed "in writing"); 33 U.S.C. § 392 ("a statement of complaint, verified by oath in writing"); 38 U.S.C. § 4322(b) ("complaint shall be in writing"); 42 U.S.C. § 2000b(a) ("complaint in writing"); 42 U.S.C. § 2000c-6(a) (same); 42 U.S.C. § 3610(a)(1)(A)(ii) ("complaints shall be in writing"); 42 U.S.C. § 15512(a)(2)(C) ("[C]omplaint filed . . . shall be in writing and notarized, and signed and sworn by the person filing the complaint."); 47 U.S.C. § 554(g) ("A complaint by any such person shall be in writing, and shall be signed and sworn to by that person."); 49 U.S.C. § 46101(a)(1) ("A person may file a complaint in writing . . .").

3. Statutory Interpretation Should Comport with the FLSA's Purpose in Light of the Beneficiary Population.

The proper interpretation of "filed any complaint" becomes even more evident in light of the practical realities of *who* the potential complainants might be under 29 U.S.C. § 215(a)(3). In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123*, this Court set forth guidelines for statutory interpretation of the FLSA and called for a practical and expansive interpretation of its protections.[29] 321 U.S. 590, 592 (1944). The Court determined that the meaning of the word "work" in the FLSA could "be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Id.* at 591–92. The Court instructed that the provisions of the FLSA "are remedial and humanitarian in purpose," and instructed that "[s]uch a statute must not be interpreted or applied in a narrow, grudging manner." *Id.* at 597.

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[29] The Seventh Circuit's holding is also contrary in spirit to this Court's recent decisions in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), and *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), which indicate that anti-retaliation provisions should be interpreted in a manner which best effectuates the broad remedial goals of the statutes in which they appear.

Applying those principles to the instant case leads to the inevitable conclusion that oral complaints of FLSA violations are protected under section 215(a)(3). It is not uncommon for an "employee" protected under the FLSA to communicate with supervisors orally when they interact on a day-to-day basis.[30] (P. App. 59.) This is particularly true in the context of the blue-collar industry, factory, and retail employees that the FLSA was primarily adopted to protect. Workers who are illiterate also most often find hourly paid employment, and would be most likely to communicate complaints verbally.[31] In addition, children under the age of fourteen who have been unlawfully employed would most likely make oral complaints of FLSA violations. *See* 29 U.S.C. §§ 203(l); 212(a). Because most of these workers do not regularly work in an administrative paperwork or computer-based industry where they would have easy access to a formal written complaint-filing process, a writing requirement is unnatural and fails to reflect the realities of the typical workplace and typical worker affected by the Act.[32]

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[30] *See, e.g., Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005); *Knickerbocker v. City of Stockton*, 81 F.3d 907, 912 n.3 (9th Cir. 1996); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 778 (N.D. Ill. 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 690 (E.D. Wis. 2007); *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 323 (W.D. Va. 1999).

[31] The most recent data available to Congress when it enacted the FLSA was from the 1930 Census. Fifteenth Census of the United States, 1930. That census reflected the following statistics: 73% of the American workforce was employed in blue-collar labor professions; there were 63,489 individuals who were blind; there were 4,283,753 (4.3%) individuals who were illiterate; and 869,865 (7%) Caucasian individuals who were foreign-born could not read and write in English. *Id.*; Comm. on Econ. Sec., *Social Security in America*, Reports & Studies (May 16, 1935), *available at*

Similarly, the most common FLSA violations are simple enough to report orally, frequently even in a single sentence. For example, common complaints concern not being paid for all time worked (as in the instant case),[33] not being paid for overtime hours,[34]

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http://www.socialsecurity.gov/history/reports/ces/cesbookc17.html (last visited June 11, 2010). Congress therefore would have likely been aware of the extremely large population group that would be unlikely or unable to submit a written complaint in 1938.

[32] The workers who would most often communicate in writing, such as lawyers, doctors, and administrators, are exempt from coverage by the FLSA, and are therefore not affected by its anti-retaliation provision. *See* 29 U.S.C. § 213(a)(1).

[33] *Cellito v. Semfed Mgmt., Inc.*, No. RDB-06-1794, 2007 WL 1725442, at *1 (D. Md. June 12, 2007); *Hernandez*, 508 F. Supp. 2d at 687; *Seever v. Carrols Corp.*, 528 F. Supp. 2d 159, 166 (W.D.N.Y. 2007); *Caci v. Wiz of Lake Grove, Inc.*, 267 F. Supp. 2d 297, 298 (E.D.N.Y. 2003); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 810 (D. Del. 1993); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F.

being asked to work without pay,[35] being paid less than the required minimum wage[36] or less than the time-and-one-half rate mandated for most overtime,[37] or being told to falsify time records.[38] Thus, based upon practical

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Supp. 57, 58 (N.D. Ga. 1985); *see also Acosta v. Yale Club of N.Y. City*, No. 94 Civ. 0888 (KTD), 1995 WL 600873, at *2 (S.D.N.Y. Oct. 12, 1995) (denial of earned tips).

[34] *Maynor v. Dow Chem. Co.*, 671 F. Supp. 2d 902, 905 (S.D. Tex. 2009); *Jafari v. Old Dominion Transit Mgmt. Co.*, No 3:08-CV-629, 2008 WL 5102010, at *2 (E.D. Va. Nov. 28, 2008); *Barturen v. Wild Edibles, Inc.*, No. 07 Civ. 8127 (LLC), 2007 WL 4468656, at *1 (S.D.N.Y. Dec. 18, 2007); *Seever*, 528 F. Supp. 2d at 166; *Boateng v. Terminex Int'l Co Ltd.*, No. 07-617, 2007 WL 2572403, at *1 (E.D. Va. Sept. 4, 2007); *Burns v. Blackhawk Mgmt. Corp.*, 494 F. Supp. 2d 427, 430 (S.D. Miss. 2007); *Haile-Iyanu v. Cent. Parking Sys. of Va.*, No. 06-2171(EGS), 2007 WL 1954325, at *1 (D.D.C. July 5, 2007); *Hernandez*, 508 F. Supp. 2d at 687; *Hicks v. Ass'n of Am. Med. Colls.*, 503 F. Supp. 2d 48, 50 (D.D.C. 2007), *Higueros v. N.Y. State Catholic Health Plan, Inc.*, 526 F. Supp. 2d 342, 344 (E.D.N.Y. 2007).

[35] *Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1044 (N.D. Ill. 2005); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 656 (N.D. Ill. 1997).

[36] *Dees v. Rsight, Inc.*, No. 6:05-cv-1923-Orl-DAB, 2006 WL 3804831, at *1 (M.D. Fla. Dec. 22, 2006); *Clevinger*, 36 F. Supp. 2d at 323.

[37] *Ergo v. Int'l Merch. Servs. Inc.*, 519 F. Supp. 2d 765, 767 (N.D. Ill. 2007); *Dougherty v. Ciber, Inc.*, No. Civ. A. 1:04-CV-1682, 2005 WL 2030473, at *1 (M.D. Pa. July 26, 2005).

observations about the legislative beneficiary group, Congress would readily have been able to foresee that complaints by workers of FLSA violations would frequently be communicated orally.[39]

4. Statutory Interpretation Should Not Attempt to Derive Meaning from Subsequently Enacted Legislation that Uses Different Language.

The Seventh Circuit misinterpreted 215(a)(3) in part because it applied statutory interpretation principles applicable to subsequently enacted legislation that used different language to prohibit retaliation. The lower court erroneously reasoned that section 215(a)(3) must not include oral complaints because:

> Congress could have, but did not, use broader language [such as the] analogous provisions in other states, including Title VII and the Age Discrimination in Employment Act ["ADEA], [which] forbid employers from retaliating against any employee who "has opposed any practice" that is unlawful under the statutes.

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[38] *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 997 (E.D. Mo. 2009); *Meredith-Clinevell v. Dep't of Juvenile Justice*, 344 F. Supp. 2d 951, 953 (W.D. Va. 2004).

[39] *See supra*, note 31.

(P. App. 42.) But in framing the language of section 215(a), Congress was not making a "legislative choice" to reject the type of language used in Title VII or the ADEA.[40] The FLSA was enacted in 1938; it was one of the earliest federal anti-retaliation laws. The ADEA and, Title VII, on the other hand, were adopted in 1964 and 1967 respectively. The ADEA, Pub. L. No. 90-202, 81 Stat. 603 (1967) (codified as amended at 29 U.S.C. § 623(d)); Title VII, Pub. L. No. 88-352, 78 Stat. 257 (1964) (codified as amended at 42 U.S.C. § 2000e-3(a)). Obviously, the congressional choice of language in 1938 did not represent a rejection of the wording of statutes not adopted until three decades later.[41]

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[40] Had Congress not included the opposition clause in the Title VII anti-retaliation provision, that provision would have been much narrower than section 215(a)(3). In terms analogous to section 215(a)(3), section 704(a) of Title VII forbids retaliation against an employee because he "made a charge." 42 U.S.C. § 2000e-3(a). But because section 706(b) of Title VII requires that any charge "shall be in writing," the protection of individuals filing charges would not have applied to workers who spoke in person or by phone with EEOC officials. *See* 42 U.S.C. § 2000e-5(b). Thus, Title VII's opposition clause was necessary to ensure that the anti-retaliation provision did not deny protection for oral complainants who have not submitted a written charge. The broader language later utilized in Title VII and the ADEA was also framed to include "opposition" to statutory violations in order to reach well beyond oral complaints. For example, Title VII's "opposition clause" includes protection for silently refusing to obey an order that could violate the statute, picketing, production slow-downs, or requesting religious accommodations. *Crawford*, 129 S. Ct. at 854; 2 EEOC, *Compliance Manual* § 8-II-B(2), p. 614. An "opposition" clause is therefore not an alternative to the "file any complaint" language in the FLSA, but actually encompasses that language as only one of several forms of protected activity.

Thus, the text of 29 U.S.C. § 215(a)(3) indicates that oral complaints are protected activity, and that the term "filed" should not be interpreted in a manner which would permit retaliation against employees who complain orally. The Seventh Circuit's decision therefore amounts to judicial revision of section 215(a)(3) to include the phrase "in writing" when Congress already chose to omit that language from that section, and strips the word "any" from its meaning and purpose in the statute.

B. The Purpose of Section 215(a)(3) Indicates that Oral Complaints Should be Protected.

The underlying purpose of section 215(a)(3) also supports an interpretation which encompasses oral complaints. The FLSA's anti-retaliation provision is essential to assuring compliance with the substantive requirements of the FLSA.[42] To secure an adequate flow of information to the Department of Labor to enable enforcement of the FLSA, Congress chose to rely on employee reports of violations. Particularly in off-the-clock cases like the present, employee reports are the *sole* source of information regarding FLSA violations.

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[41] The FLSA was drafted some sixty-two years ago, at a time when statutes were far shorter and less detailed, and were written in more general and simpler terms. The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA.

Ackerley, 180 F.3d at 1005.

As this Court explained in *Mitchell v. Robert DeMario Jewelry, Inc.*:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed Federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees

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[42] Because of the pivotal role workers play when they come forward with information about violations of the FLSA and the EPA, the Department of Labor and the EEOC both require employers to hang posters that expressly assure workers (without distinguishing between written and oral complaints) that "[t]he law . . . prohibits discriminating against or discharging workers" who file a complaint. Dep't of Labor Wage and Hour Division, FLSA Minimum Wage Poster, http://www.dol.gov/whd/regs/compliance/posters/flsa.htm (list visited June 10, 2010); EEOC, Equal Employment Opportunity Is the Law, EEOC-P/E-1 (Nov. 2009), *available at* http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf (last visited June 12, 2010).

> seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.

361 U.S. at 292 (citations omitted); (*see also* P. App. 115, 123, 130–31 (containing *FLSA Amendments of 1977: Hearings Before the Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong. (1977); H.R. Rep. No. 75-2738 (1938) (Conf. Rep.); H.R. Rep. No. 2738, at 10, 26 (1938) (Conf. Rep.).) Thus, protecting workers from retaliation under the FLSA is undoubtedly extremely important.

1. Protecting Oral Complaints Will Encourage Productive Internal Problem-Solving Between Employers and Employees.

Employee complaints to supervisors or other officials play a vital role in bringing about compliance with the FLSA. Higher ranking officials, including those most familiar with the requirements of the FLSA, may be unaware that practices forbidden by the law are occurring. Conversely, front-line supervisors who understand what is occurring may not have focused on the statutory requirements.

Neither may be paying sufficient attention to details well known to workers—such as the number of hours worked by an employee in a given week—which may be essential to assuring compliance with the law.

As a result, employees should be encouraged to raise concerns about FLSA violations to their employers in an effort to avoid resort to more formal mechanisms, and employers should be encouraged to attempt to resolve violations internally by promoting open communication with their employees without fear of reprisal. The value of informal internal complaints in the FLSA context is immeasurable:

> [Internal complaints provide] the employer [with] an opportunity to resolve the situation quietly and promptly. This is particularly important where the situation is the product of a misunderstanding. . . . [I]nternal complaints save[] employers the cost of litigation as well as other potential costs, such as personal liability, loss of productivity and negative publicity. It also allows an employer to correct the situation before involving an agency, which saves money[.]

J. Redmong, *Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision*, 42 Wm. &

Mary L. Rev. 319, 335–36, 339–40 (2000) (footnotes omitted).

The Seventh Circuit decision largely eviscerates the statute's protection for workers who bring violations of the Fair Labor Standards Act ("FLSA") or the Equal Protection Act ("EPA") to their employers' attention. As explained above, "in the workplace an employee is more likely to approach an employer with an oral complaint about wage and hour practices, rather than providing a written document." (P. App. 59.) Many employers, particularly smaller organizations, have no established form or procedure for written complaints, and most employers regardless of size would prefer to have suspected violations of law corrected before a written complaint submitted. Because employers and employees both often prefer to address such matters in a less formal, low-key manner in an effort to address problems while maintaining a productive working environment, employers rarely limit employee complaints to written statements, and often invite aggrieved workers to speak in person or by telephone with an appropriate official. Defendant's own Employee Policy Handbook repeatedly urges workers "to discuss" problems with management, and encourages them to call a toll-free hotline if they do not want to discuss the matter in person. (Dkt. # 91, Ex. 11; Dkt. # 93, Ex. 25 at 3.)

The lower court's narrow construction of section 215(a)(3) has the ironic effect of punishing workers who follow company policies and orally report FLSA violations, because they seek to solve problems in the most low key, non-confrontational manner possible. The rationale behind this unfortunate ruling has previously been rejected because of these unintended consequences:

> It would be most unreasonable that an employee, not subject to discharge because he filed a paper or letter with a wage and hours officer, could be dismissed with impunity should he have the courtesy to first . . . confer with his employer concerning his complaint.

Goldberg, 43 Lab. Cas. (CCH) ¶ 40,986.

The Secretary of Labor warned that leaving employees who make oral complaints unprotected "gives an employer a perverse incentive to fire or otherwise discriminate against an employee before he or she has had an opportunity to [file a written complaint with federal officials]."[43] Brief for EEOC as Amicus Curiae Supporting Appellees at 10–11,

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[43] Employers have an especially large financial incentive to terminate employees who bring FLSA violations to their attention. Correcting and redressing a violation of the FLSA often entails substantial cost, as an employer is required to pay the full measure of compensation mandated by federal law, as well as liquidated damages. Employers often stand to save large amounts of money if they can silence employees before they file suit or persuade the Department of Labor to do so.

Lambert, 180 F.3d 997 (Nos. 96-36017, 96-36266, and 96-36267); *see also Valerio*, 173 F.3d at 43 (stating that denial of protection "would discourage prior discussion of the matter between employee and employer, and would have the bizarre effect . . . of . . . creating an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally"); *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at *2 (D. Or. Jan. 17, 1997) (stating absence of protection creates "a perverse incentive to immediately terminate any employee who complains about wage and hour violations before the employee can [engage in protected activity]"); *Goldberg*, 43 Lab. Cas. (CCH) ¶ 40,986 ("It would be most unreasonable . . . if the employer could so summarily discharge his [employee] as to preclude formal filing."). In *Robinson v. Shell Oil Co.*, this Court declined to construe the anti-retaliation provision of Title VII in a manner which would create that type of incentive.[44]

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[44] The Court explained:

> According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims. . . . Those arguments carry persuasive force given their coherence and their consistency with

Regrettably, employees who wish to resolve an issue informally with their employers will think twice before doing so if they are aware of the potential consequences resulting from the Seventh Circuit's decision.[45] However, an interpretation that protects oral complaints will ensure that employees are able to raise concerns about FLSA violations with their employers in an attempt to cooperatively resolve the matter without the need for more formal complaint and enforcement mechanisms.

2. Protecting Oral Complaints Will Encourage Employees to Report FLSA and EPA Violations to Administrative Agencies for Enforcement Purposes.

Moreover, the Secretary of Labor's warning that "a decision . . . that internal complaints that are oral are not covered . . .

> a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.

519 U.S. at 345, *citing Mitchell*, 361 U.S. at 292–93, 80 (interpreting the FLSA antiretaliation provision).

[45] Many workers will not be able to avoid the consequences of the Seventh Circuit's decision by circumspectly putting their complaints in writing and never mentioning them out loud. Most employees are laymen with no knowledge of case law and no on-site access to skilled counsel who might advise them to raise such matters only in documents.

would have an adverse impact upon the administration of the Department of Labor's programs" is a serious concern. (P. App. 18, 46.) Limiting the scope of section 215(a)(3) to written complaints is inconsistent with the intent of Congress to safeguard access of workers to federal officials. The dissenting judges in the court below noted that the Seventh Circuit's limited construction of section 215(a)(3) would also exclude oral complaints to officials of the Department of Labor or the Equal Employment Opportunity Commission ("EEOC") (regarding the EPA):

> [N]othing in the court's holding or rationale limits its narrow construction of the statutory language to intra-company complaints. The court's decision that only written complaints are protected presumably would apply to an employee's external contacts with regulatory officials.

(P. App. 9–10.)

Although section 215(a)(3) protects the filing of "any complaint," the FLSA does not create a procedure for the submission of complaints to the Department of Labor. The only statutory reference to contacts between the Department and employees is in section 211(a), which pertains to oral communications. That section provides: "The Administrator [of the Wage and Hour Division] or his designated representatives may . . . question such employees . . . as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter." 29 U.S.C. § 211(a). Obviously, if representatives of the Division "question[ed] . . . employees," the employees would respond orally.[46] The most important responses would be statements describing violations of the Act (i.e., complaints). Congress could not have intended to exclude from the protections of section 215(a)(3) the only communications between the Department of Labor and employees expressly envisioned in the Act.

Because a "primary purpose of antiretaliation provisions [is m]aintaining unfettered access to statutory remedial mechanisms," employees should be afforded "complete freedom [from coercion]. . . 'to prevent the [agency's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *Robinson*, 519 U.S. at 346; *see also Scrivener*, 405 U.S. at 122 (*quoting John Hancock Mut.*

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[46] It is not unheard of for employers to terminate employees for communicating with the Department of Labor without filing a formal written complaint, although those employees have historically received protection under section 215. *See, e.g., Strickland v. MICA Info. Sys.*, 800 F. Supp. 1320 (M.D.N.C. 1992); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990); *Nairne v. Manzo*, No. 86-0206, 1986 WL 12934 (E.D. Pa. Nov. 14, 1986); *Daniel*, 611 F. Supp. 57; *Marshall v. Great Lakes Recreation Co., Inc.*, No 79-73849, 1981 WL 2282 (E.D. Mich. Jan. 8, 1981).

Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951)). Requiring aggrieved workers to communicate with government officials only in writing would seriously hobble that access.

The Secretary of Labor has correctly pointed out that "[p]rotecting only written complaints under Section 15(a)(3) . . . would mean, for example, that an employee who places a telephone call to the Department of Labor would not be protected."[47] Telephone calls to the national and local offices of the Wage and Hour Division[48] and to the EEOC are an important source of information to federal officials and of guidance for concerned workers. Both agencies have posted on their websites toll-free numbers which aggrieved employees are invited to use to make complaints.[49] The FLSA poster displayed (as required by law) in millions of factories and offices across the nation also contains that telephone number for the Wage and Hour Division.[50] The flow of information by telephone would largely dry up if federal officials, at the outset of any such call, were to give callers a *Miranda*-like warning that anything they said could lawfully be used against them.

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[47] Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part, Kilpatrick v. Serv. Merch., Inc., 1998 WL 865217 (E.D. La. Dec. 14, 1998) (No. Civ. A. 98-990).

[48] *E.g., Lambert*, 180 F.3d at 1001 (plaintiff telephoned Department of Labor); *Saffels v. Rice*, 40 F.3d 1546, 1547 (8th Cir. 1994) (plaintiff telephoned Wage and Hour Division); *Wigley v. W. Fla. Lighting, Inc.*, No. 8:04CV1524T27TGW, 2005 WL 3312319, at *1 (M.D. Fla. Dec. 7, 2005) (worker dismissed after she called Department of Labor); *Walker v. Washbasket Wash & Dry*, No. CIV. A. 99-4878, 2001 WL 770804, at *4 (E.D. Pa. July 5, 2001) (plaintiff com telephoned the Wage and Hour Division); *O'Brien v. Dekalb-Clinton Counties Ambulance Dist.*, No. 94-6121-CV-SJ-6, 1995 WL 694630, at *1 (W.D. Mo. Nov. 21, 1995) (plaintiff and co-worker called the Wage and Hour Division) *modified by* 1996 WL 565817 (W.D. Mo. June 24, 1996); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 810 (D. Del. 1993) (worker dismissed when he told employer that he called the Wage and Hour Division); *Daniel*, 611 F. Supp. at 58 (N.D. Ga. 1985) (plaintiff telephoned Wage and Hour Division).

In-person communication between workers and federal officials would be similarly impeded. In Wage and Hour Division and EEOC offices across the country, officials would have to limit their contact with walk-in complainants to the mute receipt of written documents. Although federal investigators could pose questions orally, workers could safely respond only by writing out their answers, or perhaps typing them on a computer. What is worse, an official explanation of such a peculiar practice, warning workers that they could lawfully be fired if they complained out loud, would doubtless deter many from dealing with the federal agency at all. This kind of procedure is completely unworkable.

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[49] The Wage and Hour Division call center phone number is displayed at http://www.dol.gov/whd/contact_us.htm (last visited June 10, 2010). The EEOC call center phone number is displayed at http://www.eeoc.gov/contact/index.cfm (last visited June 10, 2010).

[50] The toll free number for the Wage and Hour Division is 1-866-4-USWAGE.

It is unlikely that Congress intended to circumscribe the protections of section 215(a)(3) in a manner that workers would be unlikely to anticipate. A typical employee would not foresee that complaints to federal officials about FLSA violations could be unsafe unless made in writing.[51] "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

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[51] Defendant suggests that a worker who speaks with an official of the Department of Labor might be covered under the "instituted any proceeding" clause of section 215(a)(3). (Br. Opp. 14, 18, 19). If Defendant is correct, and an oral complaint to an official which could trigger an investigation is "institut[ing] a proceeding," it is unclear how Kasten's compliance with Defendant's formally established procedures requiring "discussion" with official company representatives for the purpose of initiating a corporate investigation of the alleged violation is any different. Thus, under Defendant's rationale, Kasten "institute[d] a proceeding" and should be protected.

3. Protecting Oral Complaints Is the Most Practical Approach to Effectuate the FLSA and the EPA.

Practical considerations further warrant an interpretation of section 215(a)(3) which incorporates protection for oral complaints. In *Mitchell*, this Court reasoned that the anti-retaliation provision of the FLSA should instead be interpreted in light of the practical realities weighing against an employee's decision to report her employer's alleged violations:

> Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

361 U.S. at 292.

Because the Seventh Circuit's interpretation will discourage knowledgeable employees from complaining about minimum wage and overtime violations, it undermines the purpose and effectiveness of the FLSA. *See id.* The Seventh Circuit's decision presents employees with the "Hobson's choice" of: (1) complaining informally about FLSA violations and leaving themselves unprotected from retaliation; (2) becoming their employer's formal antagonist by documenting a formal written complaint; or (3) deciding "that matters had best be left as they are." *Id.* at 293. The decision therefore leaves unprotected precisely those employees whom it ought to benefit: those with FLSA-related concerns who do not wish to "rock the boat" with the employer any more than necessary, and who desire amicable resolutions of workplace disputes.

Moreover, the Seventh Circuit decision provides no clear standard for resolving the wide range of forms a complaint might take. The panel decision varies its proposed standard between requiring a complaint to be on "paper," memorialized on a "document" or "record," or one that is just "some sort of writing." (P. App. 38–41, 43.) As the district court conceded, these standards leave entirely unclear whether section 215(a)(3) would protect an e-mail, a form of communication that was of course unknown to the framers of the FLSA, but is becoming increasingly routine.[52] (P. App. 71.)

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[52] *See, e.g., Hall v. FMR Corp.*, 667 F. Supp. 2d 185, 193 (D. Mass. 2009) ("Hall then emailed a complaint"); *Rogers v. Johnson*, No. C08-4395, 2010 WL 1688564, at *4 (N.D. Cal. Apr. 26, 2010) ("Burrow emailed a complaint"); *Colon*

What the employer sees on its computer screen is written, but it is not a paper or (as that word would have been understood in 1938) a document or record. Of course an employer might decide to print the emailed complaint on a piece of paper, but surely whether an email is protected by section 215(a)(3) cannot turn on whether the employer chose to do so. Complaints sent by texting from a cellular telephone or electronic facsimile could pose similar problems.

The Seventh Circuit's holding further presents mind-bending problems with the practical implementation of a provision providing protection only in the case of written complaints. For example, in some cases (including the instant case), a worker may only make an oral complaint, but that complaint is converted into a document (and perhaps later placed in a physical file) by the employer or by administrative officials.[53] It is unclear whether

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v. City of New York, No. 09 Civ. 3142, 2009 WL 1424169, at *2 (S.D.N.Y. May 21, 2009) ("the Prisoners' Rights Project emailed a complaint on Plaintiff's behalf"); *Kirk v. Dry Storage Corp., Logistics*, No. 4:09-CV-131-A, 2010 WL 931880, at *2 (N.D. Tex. Mar. 12, 2010) ("plaintiff emailed a complaint"); *Althouse v. Roe*, 542 F. Supp. 2d 543, 561 (E.D. Tex 2008) ("Althouse's father emailed a complaint to the Office of the Ombudsman . . . ."). The Department of Labor website also encourages workers to "[s]end an email to the Wage and Hour Division." http://www.dol.gov/whd/contact_us.htm.

[53] *E.g., Nor-Cal Beverage Co.*, 330 N.L.R.B. 610, 615 (2000) (Hurtgen, J., dissenting) (noting that a company

the employee may receive protection in this scenario.[54] As the present case demonstrates, the Seventh Circuit decision seems to indicate that whether the employee "filed a complaint" or not must turn on whether the person who created the written record was acting on behalf of the complaining employee or only for the employer or administrative agency. The answer might be different if an employer informed workers that they could make oral complaints without fear of retaliation, with an understanding that they could later be reduced to writing.

The written-versus-oral complaint dichotomy also creates strange practical implementation problems in the context of a same-decision defense. If section 215(a)(3) protected written complaints but not oral complaints, and a worker files both, the employer could evidently avoid liability if the trier of fact concluded that the employer would have terminated the employee based solely on

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official "had an oral complaint . . . filed by a pro-[union] employee, reduced to writing"); *cf.* 29 C.F.R. § 1626.7(b)(3) (West 2010) (stating "[o]ral charges filed in person or by telephone [with the EEOC], are reduced to writing").

[54] The Seventh Circuit did not address the fact that there are multiple documents reflecting Kasten's complaints that the location of the time clocks was a legal problem for Defendant. It is therefore unclear whether the court intended to hold that an employer may not document the complaint to file it on behalf of the employee.

the unprotected oral complaint, even if the employer admitted that its termination was retaliatory. [55] *See, e.g., Lundervold*, 1997 WL 907915, at *2. If an employee initially filed only a written complaint, the employer could question him about his complaint, and if the employee were foolish enough to respond by voicing a nearly identical oral complaint, the employer might lawfully be able to dismiss him for that answer. Congress could not have intended such an untoward rendition of the statute.

In sum, "[i]nterpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 67 (2006). If employees are assured protection from retaliation when they "file *any* complaint," be it oral or written, e-mailed or faxed, telegraphed or over the telephone, they are far more likely to attempt to work with their employers to resolve legal violations informally (without filing a formal, documented legal violation) or contact the Department of Labor or EEOC by telephone. An interpretation of "file any complaint" to encompass oral complaints will therefore effectuate the remedial purposes of the FLSA, secure adequate reporting and enforcement mechanisms for the FLSA and EPA, encourage a productive problem-solving process between employees and employers, and provide protection and redress for the individuals that the Act was designed to protect.

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[55] In *Maynor*, the court relied on the worker's oral complaint to interpret his earlier vague written complaint. 917 F. Supp. 2d at 925; *see also Wigley*, 2005 WL 3312319, at *1 (worker both telephoned and wrote to Department of Labor).

III. IF IT IS UNCLEAR WHETHER THE TERM "FILED" INCLUDES ORAL COMPLAINT FILINGS, THE ADMINISTRATIVE AGENCIES MUST BE AFFORDED *SKIDMORE* DEFERENCE.

Even if the meaning of the phrase "filed any complaint" was not apparent in light of the context of section 215(a)(3), the Department of Labor and EEOC's consistent, reasonable interpretation of section 215(a)(3) is entitled to deference pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Where the statutory language is ambiguous, deference must be afforded to interpretation of the administrative agency charged with interpreting and enforcing the Act, provided that interpretation is reasonable and is consistently enforced. *Id.*

The panel erred by not affording *Skidmore* deference on the grounds that the Secretary's position "rest[ed] solely on a litigating position." (P. App. 39 (*citing Smiley v. Citibank*, 517 U.S. 735, 741 (1996); *Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).) The dissent disagreed, reasoning that *Skidmore* deference does not disappear solely because the agency's position is asserted in the context of a lawsuit, when that same position is advanced outside of the context of that lawsuit as well:

> In *Auer v. Robbins,* 519 U.S. 452, 462 (1997), the Supreme Court [ruled] that the Secretary's position was worthy of deference even though advanced in litigation, [and] stated "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." The Court contrasted the situation in *Bowen,* in which it rejected the Secretary of Health and Human Service's interpretation advanced in litigation because it was adopted there for the first time and was inconsistent with the Secretary's prior litigation positions.

(P. App. 26.)

In the instant case, the Department of Labor and EEOC have held the same position for decades, bringing FLSA retaliation complaints on behalf of employees who lodge oral complaints at least as far back as 1961. *Id.* There is therefore "no reason to suspect that the Secretary's interpretation 'does not reflect the agency's fair and considered judgment'." (P. App. 26 (citing *Auer*, 519 U.S. at 462).) Thus, the Department of Labor and EEOC have adopted the correct interpretation of the phrase "filed any complaint" as used in 29 U.S.C. § 215(a)(3), which encompasses protection for oral complaints. At a minimum, their reasoned, consistent judgment should be afforded deference.

CONCLUSION

For the foregoing reasons, the phrase "filed any complaint" in 29 U.S.C. 215(a)(3) encompasses oral complaints. Summary judgment and the decision of the Seventh Circuit Court of Appeals should be reversed, and this case should be remanded to the district court for trial.

Respectfully submitted this 15th day of June, 2010.

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RESPONDENT'S BRIEF

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IN THE
Supreme Court of the United States

KEVIN KASTEN,
Petitioner,
v.
SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

The Fair Labor Standards Act prohibits retaliation against any employee who has "filed any complaint" or "instituted any proceeding" under or related to the Act. 29 U.S.C. § 215(a)(3).

The question presented is: Whether § 215(a)(3) protects oral complaints to an employer about alleged violations of the Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Saint-Gobain Performance Plastics Corporation is a wholly owned subsidiary of Saint-Gobain Ceramics & Plastics, Inc., which is in turn a wholly owned subsidiary of Saint-Gobain Abrasives, Inc., which is a wholly owned subsidiary of Saint-Gobain Delaware, which is a wholly owned subsidiary of Saint-Gobain Corporation, which is an indirect subsidiary of Compagnie de Saint-Gobain, a Paris-based corporation which is publicly owned and traded on the French Bourse..

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Comparison of S. 2926 and S. 1958 (1935 Comm. Print), *reprinted in* 1 *Legislative History of the National Labor Relations Act of 1935*, at 1319 (1949) 20, 21
1 *Legislative History of the Fair Labor Standards Amendments of 1977* (1979 Comm. Print)... 24
79 Cong. Rec. 7648 (1935)............................. 21

SCHOLARLY AUTHORITIES

Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983)..................... 48
James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. Colo. L. Rev. 91 (1989) 46

OTHER AUTHORITIES

Black's Law Dictionary (3d ed. 1933) 25
Black's Law Dictionary (9th ed. 2009)......... 18, 26
Cambridge Dictionary of American English (2000) 16, 19
A Dictionary of Modern American Usage (1935) 20
Exec. Order No. 6711 (1934)......................... 20
New Oxford American Dictionary (2d ed. 2005) 26
37 Op. Att'y Gen. 515 (1934)......................... 23
Oxford English Dictionary (2d ed. 1989)..... 16, 19
1 *Shorter Oxford English Dictionary* (5th ed. 2002) 26
Webster's New International Dictionary of the English Language (2d ed. 1935) 25
Webster's New International Dictionary of the English Language (2d ed. 1941) 16, 17

INTRODUCTION

In 1938, Congress enacted the wage-and-hour and retaliation provisions of the Fair Labor Standards Act (FLSA) and imposed criminal sanctions for their willful violation. The text of the retaliation provision, which prohibits retaliation against an employee who has "filed any complaint" under or related to the Act, and the context of the prohibition, which lists three other types of protected conduct involving governmental proceedings, show that it is triggered only by a complaint to the government. This conclusion is underlined by examination of Congress's primary purpose—to encourage information-sharing between employees and enforcement officials. And this reading of the statute is confirmed by considering how improbable and unprecedented it would be for Congress to impose criminal sanctions based on employer retaliation against an employee who complained to an employer on any subject, including a wage-and-hour dispute.

Even if the statute does not require an official complaint, there is no warrant for imposing criminal sanctions when an employee orally complains to an employer about a possible FLSA violation. The text of § 215(a)(3) requires a written complaint, particularly when the provision and the FLSA as a whole are examined and other tools of statutory interpretation are applied. If there remained any doubt about this provision's reach, the rule of lenity should be applied to narrow the potential criminal liability employers face; the Act should not be interpreted to authorize criminal sanctions based on alleged retaliation for oral complaints to employers. Petitioner and his *amici* urge a contrary result as a matter of policy, but those arguments are better presented to Congress.

Indeed, Congress has often used broader language in retaliation provisions such as those in Title VII and the ADEA, teaching by contrast that the FLSA's retaliation provision is narrower. This Court should respect Congress's choice to require the clear notice, evidentiary clarity, and certainty needed for criminal liability that is provided by limiting retaliation claims to those based on official or written complaints. The judgment below should be affirmed.

STATUTORY PROVISIONS

29 U.S.C. § 215(a)(3) provides that it shall be unlawful for any person:

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 216(a) provides:

> Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT OF THE CASE

A. Kasten's Employment At Saint-Gobain.

Respondent Saint-Gobain Performance Plastics Corporation manufactures high-performance materials, such as ceramics, glass, plastics, and silicone.

Saint-Gobain operates numerous facilities throughhout the country, including one in Portage, Wisconsin. Petitioner Kevin Kasten worked as a fabricator and utility employee at Saint-Gobain's Portage facility from October 2003 to December 2006.

Like every hourly employee at Saint-Gobain, Kasten was required to record his time by swiping a time clock. Saint-Gobain's employee handbook provides that failure to comply with the company's time-clock policy "will result in disciplinary action up to and including termination of employment." Dkt. #91, Ex. 12, at 7. The handbook also outlines a progressive disciplinary procedure under which an employee's violation of company policies will lead first to a verbal reminder, then to a written warning, and finally to termination. *Id.* at 22–23.

Kasten was no model employee. During his three-year tenure at Saint-Gobain, Kasten was disciplined more than ten times for violating various company policies, including for numerous violations of the time-clock policy. Dkt. #168, at 76; Dkt. #127, at 3. In his final year alone, Kasten was disciplined seven times, including twice for violating the company's safety policies and four times for violating the time-clock policy. Dkt. #127, at 3. That series of time-clock violations, described fully below, ultimately led Saint-Gobain to terminate Kasten's employment in December 2006.

B. Kasten's Multiple Time-Clock Violations.

Kasten's problems with the time clocks began in January 2006, nearly a year before his termination. On February 13, 2006, in accordance with the company's progressive disciplinary procedure, Saint-Gobain issued Kasten a disciplinary notice as a result of "several Kronos issues" in January 2006. Dkt. #62-

1, at 49. The notice cited the applicable section of the employee handbook and warned Kasten that "[i]f the same or any another violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued." *Id.* Kasten signed the notice, acknowledging that he read and understood it. *Id.*

Six months later, on August 31, 2006, Saint-Gobain issued a written warning to Kasten for having "several Kronos issues while working at Saint-Gobain." Dkt. #62-1, at 52. The warning again cited the handbook and warned Kasten that another violation within 12 months "will result in further disciplinary action up to and including termination." *Id.* Again, Kasten signed the warning, acknowledging that he read and understood it. *Id.*

Two months later, on October 31, 2006, Kasten again violated Saint-Gobain's time-clock policy by failing to clock-in. Dkt. #62-1, at 54. On November 10, 2006, Saint-Gobain issued yet another written warning to Kasten and suspended him for a day without pay. *Id.* The warning stated that "[t]his is the last step in the disciplinary process," and warned Kasten that another time-clock violation "will result in further disciplinary action up to and including termination." *Id.* Kasten signed the warning, again acknowledging that he read and understood it. *Id.*

After being notified that he could be terminated for further violations of the time-clock policy, Kasten told a coworker that he did not know if he could go 12 months without missing another punch. Dkt. #168, at 106–07. That statement proved prophetic: On November 28, 2006, Kasten forgot to clock-in after his lunch break. Dkt. #129, at 13. He told another coworker that he was probably going to be fired over not punching-in from lunch. Dkt. #168, at 108.

On December 6, 2006, Saint-Gobain suspended Kasten pending termination for his November 28 time-clock violation. Dkt. #129, at 13. At a meeting that day with local human-resources manager Dennis Brown and operations manager Steven Stanford, Kasten admitted that he had not punched the time clock. Dkt. #168, at 113. Five days later, on December 11, 2006, Brown informed Kasten by telephone that Saint-Gobain had decided to terminate his employment. *Id.* at 115. Shortly thereafter, Saint-Gobain sent Kasten a formal termination letter outlining his repeated violations of the time-clock policy and noting that he had been "progressively warned" about such violations. Dkt. #62-2, at 5.

Contrary to Kasten's contention, Kasten is not the only employee whom Saint-Gobain has terminated for violating the company's time-clock policy. Saint-Gobain has terminated numerous employees because of missed or forgotten punches. Dkt. #121, at 1. Kasten himself recalled that his coworker, Art Brederson, had previously been terminated for missed time-clock punches. Dkt. #168, at 143–44, 149. Kasten and Brederson had worked side-by-side on the same shift. *Id.* at 144.

C. Kasten's Alleged Oral Complaints.

Kasten claims that in September 2006—*after* he had already been disciplined twice that year for violating Saint-Gobain's time-clock policy—he began orally complaining to his supervisors about the location of the time clocks. Pet. Br. 7. Kasten thus misrepresents the record when he claims that he "had no disciplinary action for almost seven months" before he began complaining, and that he was thereafter disciplined "more often and more severely for infractions that were not previously problematic." *Id.* at 9. In fact, Kasten had already been warned that his job was in jeopardy because of repeated time-clock violations.

Nor did Kasten "repor[t] up the chain of command" as outlined in the employee handbook. Pet. Br. 7. Saint-Gobain's problem-resolution procedure states that in the event of any questions, complaints, or problems, an employee should raise the issue first with his supervisor, then with the next level of management, then with the local human-resources manager, and finally with the regional human-resources manager or the human-resources department at headquarters. Dkt. #91, Ex. 12, at 3.

Kasten did not follow this procedure. None of the individuals to whom Kasten allegedly complained recalled him raising any issues about the legality of the time clocks' location until after his December 6 suspension. Dkt. #129, at 9. The emails Kasten cites documenting his complaints about the time clocks were all sent on or after December 6, 2006. Pet. Br. 9–11. But even if all of Kasten's allegations are credited, they show at most that he made a few stray complaints about the time clocks—complaints that had more to do with Kasten's problems punching-in than they did with any legal issues relating to the the time clocks' location.

First, Kasten claims that he spoke with his shift supervisor, Dennis Woolverton, sometime in September or October. Dkt. #168, at 124. He told Woolverton that the clocks' location created practical difficulties for him because his coworkers would often "flag [him] down" and ask for his help while he was on his way to punch-in. *Id.* at 122, 125. He also claims that he "raised a concern stating how [he] thought it was illegal for the time clocks to be where they were." *Id.* at 124. This conversation, which according to Kasten took place in the hallway, was the only time Kasten remembered discussing the legal implications of the time clocks' location with Woolverton. *Id.* at 125, 128–29, 162. Woolverton did not recall having such a conversation with Kasten. Dkt. #125-4, at 79.

Second, Kasten claims that around November 15, he discussed the location of the time clocks with Lani Wruck-Williams, a human-resources generalist. Dkt. #168, at 121. He purportedly told her precisely what he had told Woolverton about the problem with coworkers flagging him down before he could clock-in. *Id.* at 122. He also told her that if the time clocks were located near the employee entrance, he would not have missed as many punches because he would have remembered to clock-in. *Id.* at 116. In addition, Kasten claims to have told Wruck-Williams that he "didn't think it was legal for the time clocks to be where they were and if they were challenged on it in court, they would lose." *Id.* at 122. Asked whether he had any notes to support his recollection of that conversation, Kasten responded that the exchange was "[s]trictly verbal." *Id.* at 123. Wruck-Williams denied the exchange. Dkt. #157, at 32–33.

Third, Kasten claims that on several occasions in the two-to-three months before he was terminated, he discussed the location of the time clocks with April Luther, an hourly employee whom he described as a "supervisor's assistant." Dkt. #168, at 125. He told Luther the "[s]ame thing again about the practicality" issue with having to "walk by people that need[ed] [his] service" on his way to the time clocks, and suggested that "it would be better if they were in a different spot." *Id.* at 125–26. He also claims to have spoken with Luther "on the legal aspects about it and even told her that [he] was thinking of starting a lawsuit about the placement of the time clocks." *Id.* at

126. According to Kasten, these conversations took place at the supervisor's desk; to his knowledge no one else observed them. *Id.* at 126–28. Luther denied such conversations took place. Dkt. #151, at 21.

Fourth, during the December 6 meeting regarding his suspension, Kasten told Brown and Stanford that the new location of the time clocks would help prevent him from missing punches.[1] Dkt. #168, at 131. Kasten claims that he also told Brown and Stanford that the old location of the clocks was a legal issue for the company and that "if they were to be taken to court, they are going to lose." *Id.* at 130. Kasten did not tell Brown and Stanford that he intended to file a lawsuit against the company. *Id.* at 131. Moreover, he acknowledged that before the December 6 meeting, he had never raised any legal issues relating to the time clocks with Brown, the local human-resources manager. *Id.* at 130.

Kasten's own testimony thus shows that he did not follow Saint-Gobain's problem-resolution procedure: He never invoked that procedure; he raised the issue with his supervisor only once, merely expressing "a concern" in the hallway about the legality of the time clocks' location; he did not take the issue to the next level of management; and he did not raise the issue with the local human-resources manager until after he had already been suspended pending termination for his fourth time-clock violation. Nor is there any allegation that Kasten ever called the hotline Saint-

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[1] In early December 2006, Saint-Gobain installed a new time clock at the entrance to the building. Dkt. #168, at 75. According to Kasten, the new clock was installed a few days before his last day at work. *Id.* at 75, 137. Saint-Gobain had been planning to install new time clocks for several months before Kasten's termination. Dkt. #129, at 16.

Gobain maintains for employees to report legal or ethical issues to the company. See Pet. Br. 6–7.

Finally, it is undisputed that before he was terminated, Kasten never put his complaints about the time clocks in writing; never made any complaint to the Department of Labor or any other agency about the location of Saint-Gobain's time clocks; and never filed any complaint against Saint-Gobain in federal or state court.

D. Kasten's Retaliation Claim.

On December 5, 2007, almost a year after he was terminated, Kasten filed this lawsuit under the FLSA, claiming that he had been terminated in violation of § 215(a)(3) because he had complained to his supervisors about the location of the time clocks.[2] Saint-Gobain moved for summary judgment, arguing that Kasten's alleged oral complaints to his supervisors were not protected conduct under § 215(a)(3), and in any event Kasten could not make out a prima facie case of retaliation because Saint-Gobain had terminated him for his repeated time-clock violations, not for any complaints about the location of the clocks.

The district court granted Saint-Gobain's motion, holding that Kasten "did not engage in any protected activity listed under § 215(a)(3)." Pet. App. 67. The court concluded that although "complaints filed with an employer are protected under the provision's 'any' complaint language," oral complaints are not protected because "the plain language of § 215(a)(3) requires that the complaint be 'filed.'" *Id.* at 70. "One cannot 'file' an oral complaint," the court explained, because the verb "to file" denotes the use of a writing. *Id.* Although the court "agree[d] that the remedial nature of the FLSA justifies a broad interpretation of its provisions," the court could not "ignore the explicit language Congress used in writing the statute." *Id.* at 69.

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[2] On the same day, Kasten filed a class-action complaint against Saint-Gobain alleging that the location of the time clocks violated the FLSA's wage-and-hour provisions. That case ultimately settled without any admission of liability by Saint-Gobain. Order on Motion to Approve Settlement Agreement, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, No. 07-cv-0449 (W.D. Wisc. Feb. 4, 2009).

The Seventh Circuit affirmed. It agreed with the district court that "internal, intracompany complaints are protected" because the statute "modifies the word 'complaint' with the word 'any.'" Pet. App. 37. Like the district court, however, it held that purely oral complaints are not protected because "the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body." *Id.* at 40. The court found it "significant" that Congress has used "broader language" in other retaliation provisions. *Id.* at 42. The court declined to defer to the Secretary of Labor's contrary interpretation because it rested "solely on a litigating position" rather than a "regulation, ruling, or administrative practice." *Id.* at 39 n.2. And the court agreed with the district court that the FLSA's remedial purpose does not justify ignoring the statute's plain language: "expansive interpretation is one thing; reading words out of a statute is quite another." *Id.* at 42–43.

The court of appeals denied Kasten's petition for rehearing en banc by a 7–3 vote, Pet. App. 1, and this Court granted certiorari, 130 S. Ct. 1890 (2010).

SUMMARY OF ARGUMENT

I. A. The FLSA's retaliation provision, 29 U.S.C. § 215(a)(3), protects only complaints to a governmental authority such as a court or administrative agency, and not internal complaints to an employer. The question whether internal complaints are protected was both pressed and passed upon below and is well within the scope of the question presented, or at the very least predicate to an intelligent resolution of that question. And the text, history, and purpose of § 215(a)(3) all confirm that Congress protected only complaints to the government.

The word "complaint" in the FLSA always refers to an official grievance filed with a governmental authority; the phrase "filed any complaint" appears alongside three other forms of protected conduct involving governmental proceedings; and the entire context of § 215(a)(3) is one of formal legal process. In addition, § 215(a)(3)'s immediate statutory predecessor protected employees who had "filed charges," a phrase that clearly contemplates an official grievance filed with a court or agency. And Congress's principal purpose in enacting § 215(a)(3) was to promote information-sharing between employees and enforcement officials—a purpose that would not be served, and indeed would be undermined, by protecting internal complaints.

B. Even if § 215(a)(3) could be read to protect internal complaints, the court of appeals correctly held that oral complaints to an employer are not protected. The phrase "filed any complaint" unambiguously requires a writing. By definition, the verb "to file" denotes delivery of a document to an official whose duty it is to keep it on file. Consistent with this plain meaning, every other time the word "file" appears in the FLSA, it refers to a writing. Had Congress intended to protect oral complaints, it could easily have used a phrase such as "made a complaint" or "expressed a complaint." Instead it used a phrase that clearly entails a writing.

None of Kasten's arguments to the contrary overcomes the plain meaning of the phrase "filed any complaint." Nor did that phrase have an established meaning in 1938 that included oral complaints. Indeed, the government's argument from the legislative history shows precisely the opposite: If Congress understood the phrases "making a complaint" and "filed charges" synonymously, then both protected only written complaints filed with a governmental authority.

C. Congress's use of broader language in other statutes further confirms the limited reach of § 215(a)(3). Many statutes use language that either expressly protects or at least comfortably accommodates oral complaints to an employer. Title VII, the Age Discrimination in Employment Act, and other statutes protect any employee who has "opposed any practice" made unlawful by those statutes. Other statutes expressly protect employees who have "provided information" or "made a complaint" to "the employer," to "a person with supervisory authority over the employee," or to "any other person."

These statutes demonstrate the kind of language Congress uses when it intends to protect oral complaints to an employer. They are not irrelevant simply because they were enacted after § 215(a)(3). Congress has enacted many modern statutes using narrow language similar to that of § 215(a)(3). And Congress has repeatedly amended retaliation provisions when convinced that broader protection was warranted, but has not amended § 215(a)(3) despite numerous opportunities to do so.

D. The tools of statutory construction thus make clear that § 215(a)(3) does not protect oral complaints to an employer. To the extent that any ambiguity remains, however, it must be construed narrowly under the rule of lenity because § 215(a)(3)—unlike almost every other retaliation provision—gives rise to potential criminal liability. Kasten and the government instead ask the Court to adopt the broadest possible construction of § 215(a)(3), one that would require the Court to construe *two* levels of ambiguity broadly. That is not how this Court ordinarily interprets criminal laws.

E. Kasten's policy arguments do not support a different conclusion. Many of them are irrelevant because they erroneously assume either that written complaints to an employer are protected or that adhering to the ordinary meaning of "filed" would leave oral complaints to an agency unprotected. Others ignore both the significant costs that a private cause of action for retaliation imposes on law-abiding employers and the significant benefits that a writing requirement entails. All are misguided: Congress already struck the balance it deemed appropriate between the costs and benefits of protection from retaliation, and the courts are neither authorized nor equipped to strike a different one.

II. The interpretation urged by the Secretary of Labor and Equal Employment Opportunity Commission (EEOC) is not entitled to deference. After applying the ordinary tools of statutory construction—including the rule of lenity—no ambiguity remains for the agencies to resolve. In any event, Congress has not delegated authority to the Secretary or EEOC to authoritatively construe § 215(a)(3), and even if it had, the interpretation they advance here was not promulgated in an exercise of such authority. Their interpretation is therefore not entitled to *Chevron* deference. Nor is it entitled to any lesser degree of deference: For all of the reasons given above and those explained more fully below, the agencies' position lacks power to persuade.

ARGUMENT

I. SECTION 215(a)(3) DOES NOT PROTECT ORAL COMPLAINTS TO AN EMPLOYER.

A. Section 215(a)(3) Protects Only Complaints To The Government.

The text, history, and purpose of § 215(a)(3) all confirm that Congress protected only complaints to a court or administrative agency, and not internal complaints to an employer.

1. Initially, the government errs in contending that Saint-Gobain waived this argument. U.S. Br. 9. The question whether § 215(a)(3) protects internal complaints was both raised before and decided by the courts below, and it is well within the scope of the question presented. See Pet. for Cert. i (framing the question presented as whether "an oral complaint of a violation of the Fair Labor Standards Act [is] protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)").

The government asks this Court to answer the question presented in the abstract, divorced from the context of this case. As Saint-Gobain noted in its brief in opposition, however, the answer to the question presented (as framed in the petition for certiorari) may well depend on whether the "oral complaint of a violation" is made to an employer or to an agency. See Br. in Opp. 14 (noting that an oral complaint to an agency may "institut[e] [a] proceeding" within the meaning of § 215(a)(3)); *id.* at 18 (noting that the court of appeals addressed only "the circumstances under which a grievance to an employer may constitute statutorily protected activity"). Whether complaints to an employer are protected is thus fairly included in the question presented. See *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 n.1 (2009) ("Although the parties did not specifically frame the question to include this threshold inquiry, '[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.'" (quoting Sup. Ct. R. 14.1)).

Moreover, even when this Court *may* deem an argument waived, it "ha[s] not done so when the issue not raised in the brief in opposition was 'predicate to an intelligent resolution of the question presented.'" *Jones* v. *United States*, 527 U.S. 373, 397 n.12 (1999) (plurality opinion). That is the case here. The only question presented by the facts of this case is whether § 215(a)(3) protects oral complaints *to an employer;* whether oral complaints *to an agency* are protected is not before the Court. And it would make little sense to address whether § 215(a)(3) protects oral complaints to an employer if § 215(a)(3) does not protect complaints of any kind merely to employers. See *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006). The government effectively concedes as much by arguing only that "*if* an employee may not be discharged for an internal written complaint, there is no reason to allow discharge for an internal oral complaint." U.S. Br. 6 (emphasis added). The question presented cannot be intelligently decided without analyzing the government's antecedent "if."

Nor is there any reason *not* to decide whether § 215(a)(3) protects internal complaints. The question is squarely presented, and it has been fully aired in the courts of appeals; indeed, it is that question, much more so than whether § 215(a)(3) protects oral complaints, that has divided the courts of appeals. See U.S. Br. 9 ("[U]ntil the decision below, no court of appeals had held that internal written complaints are covered while internal oral complaints are not."). Sidestepping the question would only needlessly prolong the confusion in the lower courts. This Court therefore can and should decide whether § 215(a)(3) protects internal complaints.

2. "As with any question of statutory interpretation," the analysis of whether § 215(a)(3) protects internal complaints "begins with the plain language of the statute." *Jimenez* v. *Quarterman*, 129 S. Ct. 681, 685 (2009). Section 215(a)(3) prohibits retaliation against any employee who has "filed any complaint . . . under or related to" the Act. The key word is "complaint."

Standing alone, the word "complaint" is ambiguous. In general usage, a "complaint" is simply "[a]n utterance or statement of grievance or injustice suffered," 3 *Oxford English Dictionary* 608 (2d ed. 1989), or "a statement that something is wrong or not good enough," *Cambridge Dictionary of American English* 172 (2000); see also *Webster's New International Dictionary of the English Language* 546 (2d ed. 1941) ("Expression of grief, regret, pain, censure, grievance, or resentment . . . ."). But the word "complaint" also has a specialized legal meaning: "a formal statement to a government authority that you have a legal cause to complain about the way you have been treated." *Cambridge Dictionary of American English* at 172; see also 3 *Oxford English Dictionary* at 608 ("A statement of injury or grievance laid before a court or judicial authority . . . for purposes of prosecution or of redress . . . ."); *Webster's New International Dictionary* at 546 ("A formal allegation or charge against a party, made or presented to the appropriate court or officer . . . ."). The question is whether Congress used the word "complaint" in its general sense or in its specialized legal sense when it prohibited retaliation against any employee who has "filed any complaint" under or related to the FLSA.

The court of appeals thought this ambiguity was resolved by Congress's use of the word "any." Pet. App. 37. That is superficially appealing but wrong. When a word has more than one potential meaning, modifying it with the word "any" does not resolve the ambiguity. Rather, it is the *context* in which a word is used that clarifies which meaning the speaker intends. See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context."). By itself, for example, the word "bank" could refer to a variety of objects, including a financial institution, the edge of a river, a depository for blood donations, or a group of elevators. But if a person says, "You may deposit this check in any bank," no one would think that the speaker means for the check to be deposited in a riverbank. The context makes clear that the speaker means only any financial institution and not any other kind of bank.

Likewise, the context in which Congress used the word "complaint" in § 215(a)(3) makes clear that Congress meant only an official grievance filed with a governmental authority. For three reasons, Congress plainly used the word "complaint" in its specialized legal sense when it prohibited retaliation, not against any employee who complained, but against any employee who "filed any complaint" under or related to the FLSA.

First, elsewhere in the FLSA where Congress used the word "complaint," it always meant an official grievance filed with a governmental authority. See § 216(b) (referring to the "filing of a complaint by the Secretary of Labor" in an enforcement action); § 216(c) (providing for the "filing of a complaint" to recover unpaid minimum wages or overtime compensation); *id.* (specifying that the statute of limitations begins to run "when the complaint is filed" if the claimant is "named as a party plaintiff in the complaint"). The word "complaint" in § 215(a)(3) should be construed similarly under the "normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005).

Second, the phrase "filed any complaint" appears alongside three other protected activities, each of which involves resort to a governmental authority or participation in governmental proceedings. See *S.D. Warren Co.* v. *Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." (internal quotation marks omitted)). In addition to employees who have "filed any complaint," § 215(a)(3) also protects any employee who has (1) "instituted or caused to be instituted any proceeding under or related to" the Act; (2) "testified or is about to testify in any such proceeding"; or (3) "served or is about to serve on an industry committee."

A "proceeding," in turn, is "[a]ny procedural means for seeking redress from a tribunal or agency." *Black's Law Dictionary* 1324 (9th ed. 2009). That

Congress used "proceeding" in this formal sense, and not in the looser sense of any series of activities involving a set procedure, is confirmed by the fact that the word "proceeding" is "modified by attributes of administrative or court proceedings; it must be 'instituted,' and it must provide for 'testimony.'" *Ball* v. *Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000). In addition, every other time the word "proceeding" appears in the FLSA, it refers to a judicial or administrative proceeding. See § 207(o)(6)(A)(iii); § 210(a), (b); § 214(c)(5)(C); § 216(d), (e)(4); § 216b; § 217.

Service on an industry committee likewise involved participation in governmental proceedings. Section 5 of the original Act, which has since been repealed, provided for appointment of industry committees charged with recommending to the Department of Labor the appropriate minimum wage for particular industries. Fair Labor Standards Act of 1938, ch. 676, § 5, 52 Stat. 1060, 1062. The committees were authorized, among other things, to "investigate conditions in the industry," to "hear . . . witnesses," and to "receive . . . evidence" to enable them to "perform [their] duties and functions under this Act." *Id.* § 8(b), 52 Stat. at 1064.

Third, the phrase "filed any complaint," particularly when used in conjunction with the phrase "instituted any proceeding," connotes the beginning of a legal process. See *Cambridge Dictionary of American English* at 318 ("To file something can mean to make an official record of it, or to begin a legal process."). The word "filed," both in its ordinary sense and as Congress used it repeatedly throughout the FLSA, requires a writing. See *infra*, 25–26. The word "filed" also suggests a formal or official act. See 5 *Oxford English Dictionary* at 904 ("To place (a document) in due manner among the records of a court or public office."); *A Dictionary of Modern American Usage* 130–31 (1935) ("[T]he formal presentation of a document to the official whose duty it will then be to place it on his file."). Although it is of course possible to speak of filing a complaint with one's employer, the entire sense of § 215(a)(3) is one of formal legal process.

All of the textual evidence thus indicates that the phrase "filed any complaint" refers only to formal complaints filed with a court or administrative agency. That reading is further confirmed by the history of § 215(a)(3).

3. As the government notes, U.S. Br. 20, § 215(a)(3) was preceded by the retaliation provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(4), which in turn was preceded by Executive Order No. 6711 (1934). The Executive Order prohibited retaliation against any employee "for making a complaint or giving evidence with respect to an alleged violation." And § 158(a)(4) prohibited retaliation against any employee "because he has filed charges or given testimony" under the NLRA. Despite the change from "making a complaint" to "filed charges," § 158(a)(4) was described in the legislative history as "merely a reiteration" of the Executive Order. *Comparison of S. 2926 and S. 1958*, at 29 (1935 Comm. Print), *reprinted in* 1 *Legislative History of the National Labor Relations Act of 1935*, at 1319, 1355 (1949) ("Bill Comparison").

The immediate statutory predecessor of § 215(a)(3) thus prohibited retaliation against any employee who "filed charges," and there is evidence that Congress understood the words "filed charges" and "making a complaint" synonymously. Contrary to the government's contention, however, this history does not support the view that § 215(a)(3) protects internal complaints. Rather, the phrase "filed charges" clearly contemplates a formal grievance filed with a governmental authority. See *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 402 (2008) ("[I]f a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action . . . ."); *id.* at 409 (Thomas, J., dissenting) ("In legal parlance, a 'charge' is generally a formal allegation of wrongdoing that initiates legal proceedings against an alleged wrongdoer.").

Moreover, the legislative history of the NLRA contains no evidence that § 158(a)(4) protected employees who "filed charges" against their employers internally (if that counterintuitive notion is even possible). The committee report on which the government relies cited three decisions of the National Labor Relations Board (NLRB) under the 1934 Executive Order that "attested" to the "need for this provision." Bill Comparison at 1355. Each decision involved retaliation for either a complaint to an agency, *Zenith Radio Corp.*, 1 N.L.R.B. Dec. 202 (1934); *N.Y. Rapid Transit Corp.*, 1 N.L.R.B. Dec. 192 (1934), or testimony given in judicial proceedings, *Ralph A. Freundlich, Inc.*, 2 N.L.R.B. Dec. 147 (1935). And the colloquy the government cites between Senators Wagner and Hastings concerned the possibility that § 158(a)(4) would protect employees who "file charges maliciously," 79 Cong. Rec. 7648, 7676 (1935)—a concern that obviously pertained to the filing of charges with a governmental authority.[3]

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[3] The government also cites a 1939 NLRB decision for the proposition that § 158(a)(4) protected employees who orally complained to their employers. U.S. Br. 21 n.10 (citing *Viking Pump Co.*, 13 N.L.R.B. 576, 590 (1939)). That decision said nothing of the sort. It held only that the respondent had violated

The text and history of § 158(a)(4) thus demonstrate that Congress protected only charges filed with a court or administrative agency under the NLRA. Nothing in the legislative history of the FLSA suggests that Congress intended § 215(a)(3) to expand that protection to employees who complained internally to their employers. The legislative history of the FLSA contains numerous references to "complaints." Without exception, they refer to complaints to a governmental authority; none involves a complaint by an employee to his employer.[4]

4. The purpose of § 215(a)(3) likewise supports the view that only complaints to governmental authorities are protected. The primary purpose of § 215(a)(3) is to aid the government's enforcement efforts by ensuring that employees—who have the best access to relevant information—report violations to the appropriate authorities. As Attorney General Cummings explained in his memorandum to the President regarding the Executive Order of 1934:

> Ordinarily only the employees will know about their employer's violation of th[e] provisions [applicable to employees]. Obviously, the labor

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§ 158(a)(4) by firing an employee "because he gave testimony under the Act," *Viking Pump*, 13 N.L.R.B. at 590—conduct that is expressly protected under both § 158(a)(4) and § 215(a)(3).

[4] *See, e.g.*, *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the H. and S. Comms. on Labor*, 75th Cong. 29 (1937) ("Of course, anybody can go to the labor board . . . with any complaint . . . ."); *id.* at 37 ("He can file a complaint . . . . He can go to the Board and complain of any unfair labor practice under this act."); *id.* at 88 (citing "complaints" as one of the "methods by which a case can come before the Board"); *id.* at 100 (describing the Act's policing mechanism as involving "complaint[s] . . . to the board"); *id.* at 695 ("[T]here has got to be a grievance, there has got to be a complaint filed by somebody with the Board.").

> provisions in Codes cannot be adequately enforced unless employees report violations of these provisions to the proper authorities. They will not be likely to report such violations, however, as long as the employer retains the right to dismiss because of having filed a complaint against him. The proposed Executive order frees the workers from this form of restraint and directly tends to aid in the enforcement of the Codes.

37 Op. Att'y Gen. 515, 516 (1934).

This purpose—ensuring that the government has adequate information to enforce the Act—has always been understood to be at the heart of both § 215(a)(3) and its predecessor § 158(a)(4). As this Court explained in describing the purpose of § 158(a)(4), the "complete freedom" to file complaints with the NLRB "is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972). And as this Court explained in its only pronouncement to date on the purpose of § 215(a)(3), the "end" that Congress sought to achieve by protecting employees from retaliation was open communication between employees and federal authorities responsible for enforcing the Act:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach

> officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve.

Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

That Congress was concerned primarily with ensuring that retaliation by employers does not frustrate the government's enforcement efforts is further evidenced by the fact that when Congress enacted § 215(a)(3) in 1938, it did not create a private right of action for retaliation. Not until 1977 did Congress amend the FLSA to allow aggrieved employees to sue for retaliation. Pub. L. No. 95-151, § 10, 91 Stat. 1245, 1252 (1977). Before that time, only the Secretary of Labor could enforce § 215(a)(3). See 1 *Legislative History of the Fair Labor Standards Amendments of 1977*, at 375 (1979 Comm. Print).

In light of § 215(a)(3)'s information-sharing purpose, it makes perfect sense for Congress to have limited protection to complaints to governmental authorities—complaints communicated only to employers do not enhance the government's knowledge of employers' compliance with the law or aid the government's enforcement efforts. Indeed, encouraging employees to complain only to their employers would be directly at odds with Congress's purpose. Kasten and his *amici* contend that Congress intended to allow employers in effect to police themselves by resolving disputes internally, but that is a patently revisionist reading of the Act. While self-policing and internal dispute-resolution may be a good idea, there is no evidence that it was the idea that animated Congress to enact § 215(a)(3).

B. Section 215(a)(3) Does Not Protect Oral Complaints To An Employer.

1. For these reasons, § 215(a)(3) is best read to protect only complaints to a court or administrative agency, and not internal complaints to an employer. But even if § 215(a)(3) could be read to protect internal complaints, the decision below should still be affirmed because the court of appeals correctly held that oral complaints to an employer are not protected.

In determining whether § 215(a)(3) protects oral complaints, the key statutory term is "filed." Like any other undefined term, the word "filed" must be given its "ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks omitted); see also *United States* v. *Lombardo*, 241 U.S. 73, 76 (1916) ("'The word "file" was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied.'"). Contrary to Kasten's contention, the word "filed" does have an intrinsically plain meaning in this context: It requires a writing.

"'The word "file" is derived from the Latin word "*filum*," and relates to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference.'" *Id.* By definition, the verb "to file" denotes delivery of a document. That was true in 1938. See, *e.g.*, *Webster's New International Dictionary of the English Language* 60 (2d. ed. 1935) ("To deliver (a paper or instrument) to the proper officer so that it is received by him to be kept on file, or among the records of his office."); *Black's Law Dictionary* 777 (3d ed. 1933) ("To deliver an instrument or other paper to the proper officer for the purpose of being kept on file by him in the proper place."). And it is true today. See, *e.g.*, *New Oxford American Dictionary* 627 (2d ed. 2005) ("submit (a legal document, application, or charge) to be placed on record by the appropriate authority"); 1 *Shorter Oxford English Dictionary* 955 (5th ed. 2002) ("Place (a document) on file among official records by formal procedures of registration; submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority."); *Black's Law Dictionary* 704 (9th ed. 2009) ("To deliver a legal document to the court clerk or record custodian for placement into the official record.").

Consistent with this plain meaning, Congress used the word "file" multiple times in the FLSA—always in reference to a writing. See § 203(l) (requiring employers to "have on file an unexpired certificate"); § 210(a) (requiring the Secretary to "file in the court the record of the industry committee"); *id.* (requiring industry committees to "file" their findings and recommendations); § 210(b) (prohibiting a stay unless the movant "file[s] in court an undertaking"); § 214(c)(5)(A) (permitting employees to "file . . . a petition" for review of a special minimum-wage rate); *id.* (requiring employees' written consent to join a class action to be "filed"); § 216(b) (same); § 216(c) (specifying that the statute of limitations begins to run on "the date when the complaint is filed"); see also ch. 676, § 8(d), 52 Stat. at 1064 (provision of original Act requiring an industry committee to "file with the Administrator a report containing its recommendations").

Moreover, as discussed above, the word "complaint" as used in § 215(a)(3) means an official grievance, and the entire context of § 215(a)(3) is one of formal process—a context in which "proceeding[s]" are "instituted" and employees may be called upon to "testify." Even if this language can be stretched to reach complaints to an employer as opposed to a governmental authority, a written complaint fits much more comfortably in this context than an oral one. Certainly the words Congress chose in § 215(a)(3) would not ordinarily be used to describe the expression of a concern to one's supervisor in the hallway.

Congress's use of the words "filed any complaint" is thus dispositive. If Congress had intended to protect oral complaints, "[t]he idea . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944). Congress could have written "made a complaint," "expressed a complaint," "stated a complaint," "lodged a complaint," or even simply "complained." None of these formulations would necessarily have required a written complaint. Instead Congress chose to use the phrase "filed a complaint," a phrase that clearly contemplates a writing. That choice must be respected.

2. Attempting to overcome the plain meaning of the phrase "filed any complaint," Kasten makes essentially six arguments. None is persuasive.

First, Kasten asserts that "to file" means generally to submit information to another for consideration, including orally. Pet. Br. 22. No dictionary definition supports that assertion. The very dictionaries Kasten relies on demonstrate that when something is submitted by filing, the thing submitted must be a document (such as a patent application or a petition for a divorce). See *id.* at 22 n.10. And even if the word "file" can refer to oral transmissions in other contexts, such as in specialized usage in the news industry, the ordinary meaning of the word does not include oral submissions either generally or in the specific context of filing a complaint about an alleged violation of law.

Second, Kasten notes that speakers sometimes refer in the colloquial to oral "filings." Pet. Br. 22–24. But "[i]n statutory drafting, where precision is both important and expected, the sort of colloquial usage on which [Kasten] relies is not customary." *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123, 2129 (2008). Even in the colloquial, moreover, the phrase "filed a complaint" is more naturally understood as a reference to a written complaint than to an oral one. See Pet. App. 39–40 ("If an individual told a friend that she 'filed a complaint with her employer,' we doubt the friend would understand her possibly to mean that she merely voiced displeasure to a supervisor."). Indeed, even courts that have adopted Kasten's interpretation have acknowledged that it conflicts with the ordinary meaning of "filed." See *Conner* v. *Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997) ("We have not read section 15(a)(3) literally, however . . . ."); *EEOC* v. *White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) ("The charging parties did not perform an act that is explicitly listed in the FLSA's anti-retaliation provision . . . ."); *Goldberg* v. *Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, at 40,986 (D. Utah Aug. 2, 1961) ("I am mindful that the word 'file' ordinarily has reference to a written document . . . .").

Third, Kasten cites a handful of regulations and state statutes that provide for oral "filings." Pet. Br. 25–29. These statutes and regulations show only that their drafters used the word "file" in a way that departs from its ordinary meaning—there would be no need to specify that a "filing" may be either oral or written if the ordinary meaning of the word already encompassed both methods.

These provisions are also of little utility in determining what *Congress* meant when it enacted § 215(a)(3). Far more probative on that score is the fact that Congress itself has never provided for a complaint (or anything else) to be "filed" orally. So far as the United States Code is concerned, the category of oral "filings" is a null set. See U.S. Br. 18 ("[T]he government has not identified any instance in which Congress has specified that a complaint may be filed orally.").

Fourth, Kasten argues that Congress's use of the words "any complaint" indicates that § 215(a)(3) encompasses complaints in any form, including oral complaints. Pet. Br. 32–37. This argument wrongly treats the words "any complaint" as if they stood alone. In fact, those words are governed by the verb "filed." That choice of verb limits the range of protected "complaints" to those that can be "filed." Returning to the bank example, if a person says, "You may deposit this check in any bank," he obviously means only the type of bank in which a check can be deposited; a blood bank or an elevator bank would not do. So too here: Because an oral complaint cannot be "filed" unless it is reduced to writing, it does not fall within the plain meaning of the phrase "filed any complaint." The word "any" signifies only that the statute protects complaints about any subject related to the FLSA.

Fifth, Kasten argues that oral complaints are protected because § 215(a)(3) does not expressly require a writing, whereas three other provisions in-the FLSA that use the word "file" do.[5] Pet. Br. 37–38. In two of these provisions, however, the express writing requirement is essential to the provision's meaning wholly apart from the filing requirement. Both provide that an employee may not join a class action unless he "gives [his] consent in writing" to become a party and such consent "is filed" with the court or agency. § 214(c)(5)(a); § 216(b). Congress separated the consent requirement from the filing requirement, using the active voice ("gives [his] consent") for the former to indicate that the employee must personally give his written consent to join the class action, but the passive voice ("is filed") for the latter to indicate that the employee need not personally file the consent. This makes clear that an employee may not simply give his oral consent to another person (*e.g.*, the class representative) who then files a document communicating the employee's consent to the court or agency; the document filed must be one executed by the employee. Had Congress omitted the words "in writing," this requirement would not have existed. The express writing requirements in § 214(c)(5)(a) and § 216(b) thus serve their own distinct purpose and say nothing about the absence of such a requirement in § 215(a)(3).

Nor does the third provision help Kasten. It allows a party to obtain judicial review of a wage order by "filing . . . a written petition" for review. § 210(a). Kasten is correct that the word "written" in § 210(a) is redundant, but that is no more than a debater's point. Such minor redundancies in statutes are not uncommon. (An electronic search of the unannotated

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[5] The government cites a fourth provision requiring employers to "provid[e]" certain "written assurances to the Secretary." § 214(c)(2). This provision is irrelevant because its operative verb is "provide," which unlike "file" does not denote a writing.

U.S. Code on the words "written document" yields 39 hits.) Accepting Kasten's argument, by contrast, would mean that if Congress had omitted the word "written" from § 210(a) and instead provided simply that a lawsuit could be commenced by "filing a petition" in the appropriate court—as Congress has done in countless other statutes providing for judicial review of agency action—then a person could have commenced a lawsuit by "filing" an oral petition for review. Better to indulge Congress in a trivial redundancy than to accept the improbable conclusion Kasten's argument embraces.

Sixth, Kasten argues in a similar vein that oral complaints are protected because § 215(a)(3) does not expressly require complaints to be in writing, whereas several other statutes do. Pet. Br. 39. Many of the statutes Kasten cites, however, do not use the term "filed" and are thus irrelevant.[6] Others lay out in detail the various requirements for the form and content of the complaint, specifying, for example, that it must be signed, sworn, and notarized.[7] None suggests that absent an express writing requirement, Congress intends the verb "to file" to include oral submissions. The better inference—especially given the plain meaning of the word and the absence of any provision in the Code for "filing" an oral complaint—is that when Congress requires a person to "file" a complaint, it intends for the complaint to be in writing, regardless of whether it says so expressly.

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[6] *E.g.*, 7 U.S.C. § 193(a); *id.* § 228b-2(a); *id.* § 1599(a); 19 U.S.C. § 2561(a); 33 U.S.C. § 392; 42 U.S.C. § 2000b(a).

[7] *E.g.*, 2 U.S.C. § 437g(a)(1); 5 U.S.C. § 3330a(a)(2)(B); 38 U.S.C. § 4322(b); 42 U.S.C. § 3610(a)(1)(A)(i)–(ii); *id.* § 15512(a)(2)(C); 47 U.S.C. § 554(g)

3. The government makes one additional argument against according the word "filed" its ordinary meaning: It contends that the phrase "filed any complaint" had a recognized meaning in labor law in 1938 that included oral complaints. U.S. Br. 20–22. This argument too is meritless.

The government does not cite any FLSA-era judicial decisions construing the phrase "filed any complaint" in the labor context. None appears to exist. Decisions from that era in other contexts, however, belie the government's assertion that Congress would have understood the word "filed" to include oral submissions. See *Ritter* v. *United States*, 28 F.2d 265, 267 (3d Cir. 1928) ("The statute and regulations prescribed that a claim must be filed. This means a written claim, and not an oral one, because it is difficult to know just how to file an oral claim. It could not be done, unless it was reduced to writing . . . ."); *Bd. of Registration Comm'rs* v. *Campbell*, 65 S.W.2d 713, 718 (Ky. 1933) ("The fact that the act provides that in the event of a protest, it must be filed, clearly shows that by its use of the word 'filed' the Legislature intended that such protest must be in writing.").

The government's argument thus does not rely on any established judicial construction of the words "filed any complaint." Instead, it rests entirely on the supposed equivalence between the Executive Order of 1934 and § 158(a)(4) of the NLRA. For the reasons already explained, both provisions protected only complaints to a governmental authority. But even if these provisions could have been understood to protect internal complaints, there is no evidence that they were understood to protect internal *oral* complaints.

To make that leap, the government reasons as follows: The Order prohibited retaliation for "making a complaint" and thereby protected both written and oral complaints. When Congress enacted § 158(a)(4) and prohibited retaliation against employees who had "filed charges," it merely reiterated the Order and made no substantive change. Accordingly, § 158(a)(4) protected both written and oral charges. When Congress enacted § 215(a)(3), it did not intend to curtail that protection. Therefore, § 215(a)(3) protects both written and oral complaints.

The government's reasoning is twice flawed. Initially, it is far from clear that § 158(a)(4) made no substantive change to the Order. The language changed significantly—from "making a complaint," which at least on its face could encompass oral complaints, to "filed charges," which clearly contemplates a writing. But even if § 158(a)(4) was merely a reiteration of the Order and the two must be viewed as coextensive, the government draws the wrong inference from that fact: It assumes that both provisions must have protected oral complaints, ignoring the possibility that neither did. It is far more likely that Congress understood the phrase "making a complaint" to encompass only written complaints filed with a governmental authority than it is that Congress understood the phrase "filed charges" to encompass oral complaints to an employer. The former possibility is at least linguistically defensible; the latter strains language to the breaking point. The government's argument thus collapses on itself.

C. Congress's Use Of Broader Language In Other Retaliation Provisions Confirms The Limited Reach Of § 215(a)(3).

1. Even if the text, history, and purpose of § 215(a)(3) were not sufficient to make clear that oral

complaints to an employer are not protected, that conclusion becomes inescapable when the narrow language Congress used in § 215(a)(3) is contrasted with the significantly broader language Congress has used in other statutes—language that expressly covers or readily encompasses internal complaints, oral complaints, or both.

The court of appeals identified two such examples. It emphasized that Title VII and the Age Discrimination in Employment Act (ADEA) both forbid employers to retaliate against any employee who has "'opposed any practice'" that is unlawful under those statutes. Pet App. 42 (citing 42 U.S.C. § 2000e-3(a), 29 U.S.C. § 623(d)); see also Family and Medical Leave Act, 29 U.S.C. § 2615(a)(2); Americans with Disabilities Act, 42 U.S.C. § 12203(a). "This broader phrase," the court noted, "does not require a 'fil[ing],' and has been interpreted to protect verbal complaints." Pet. App. 42. It also encompasses activities that an employee engages in at work in addition to formal administrative or judicial proceedings. See *Crawford* v. *Metro. Gov't*, 129 S. Ct. 846, 850–52 (2009).

Other statutes use even more explicit language to protect oral complaints to an employer. Many statutes, for example, prohibit retaliation against any employee who has "provided information" or "made a complaint" regarding a potential violation to "the employer," to "a person with supervisory authority over the employee," or to "any other person."[8] Other statutes use language that clearly protects oral complaints, without expressly stating whether internal complaints are protected.[9]

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[8] *E.g.*, National Transit Systems Security Act, 6 U.S.C. § 1142(a)(1)(C) (prohibiting retaliation against any employee who "provide[d] information" regarding a potential violation to "a person with supervisory authority over the employee"); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(a)(1) (same as to any employee who "provided . . . to the

The government inexplicably cites many of these provisions as examples of statutes that would supposedly be endangered by holding that § 215(a)(3) does not protect internal oral complaints. U.S. Br. 27 n.12. It also contends—citing several court-of-appeals decisions but none from this Court—that various

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employer . . . information relating to any violation"); Asbestos Hazard Emergency Response Act, *id.* § 2651 (same as to any employee who "provided information relating to a potential violation . . . to any other person"); Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a)(1)(C) (same as to any employee who "provide[d] information" regarding a potential violation to "a person with supervisory authority over the employee"); Mine Health and Safety Act, 30 U.S.C. § 815(c)(1) (same as to any miner who "has filed or made a complaint . . . including a complaint notifying the [mine] operator"); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1) (same as to any employee who "notified his employer of an alleged violation"); Federal Rail Safety Act, 49 U.S.C. § 20109(a)(1)(C) (same as to any employee who "provide[d] information" regarding a potential violation to "a person with supervisory authority over the employee"); Federal Aviation Act, *id.* § 42121(a)(1) (same as to any employee who "provided . . . to the employer . . . information relating to any violation"); Pipeline Safety Improvement Act, *id.* § 60129(a)(1) (same).

[9] The Employee Retirement Income Security Act, for example, prohibits retaliation against any employee who "has given information" in "any inquiry or proceeding" related to the statute. 29 U.S.C. § 1140. While this language clearly encompasses oral complaints, the circuits are split as to whether it covers internal complaints. *See Edwards* v. *A.H. Cornell & Son*, No. 09-3198, 2010 WL 2521033, at *3–4 (3d Cir. June 24, 2010) (describing split). Other statutes using similar formulations include the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7116(a)(4), and the Foreign Service Act, 22 U.S.C. § 4115(a)(4).

other statutes would be undermined by a ruling in Saint-Gobain's favor. *Id.* at 27–28. Many of the statutes the government cites either expressly protect or could arguably be construed to protect internal oral complaints by virtue of additional language not included in § 215(a)(3). Others, like § 215(a)(3), may not protect internal oral complaints.

One thing is certain: Given the variety of formulations Congress has used to prohibit retaliation in different contexts, close attention must be paid to the language and structure of each statute. And the stark contrast between the broad language Congress used in other statutes and the narrow language it used in § 215(a)(3) is telling: It indicates that "the cause of action for retaliation under the FLSA is much more circumscribed." *Ball*, 228 F.3d at 364.

2. Kasten argues that the broad language Congress used in other retaliation provisions is irrelevant because those provisions were enacted long after § 215(a)(3). Pet. Br. 44–46. This is surprising, since Kasten himself relies on legislation, including amendments to the FLSA, enacted well after 1938 to support his proposed construction. See, *e.g.*, *id.* at 38–39. In any event, while it may be that "negative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously," *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1940 (2008) (alteration and internal quotation marks omitted), those "implications" do not disappear merely because the enactments are some years apart. The Court must still strive to interpret the Code as a coherent body of law, and the marked difference in the language Congress used in other statutes cannot simply be ignored.

That is particularly true because Congress has enacted many modern statutes that use language identical or substantially similar to that of § 215(a)(3). These include the Occupational Safety and Health Act;[10] the Clean Water Act;[11] the Resource Conservation and Recovery Act;[12] the Migrant and Seasonal Agricultural Worker Protection Act;[13] the Employee Polygraph Protection Act;[14] the Immigration and Nationality Act;[15] the

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[10] Pub. L. No. 91-596, § 11(c)(1), 84 Stat. 1590, 1603 (1970) (29 U.S.C. § 660(c)(1)) (prohibiting retaliation against any employee who "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act").

[11] Pub. L. No. 92-500, sec. 2, § 507(a), 86 Stat. 816, 890 (1972) (33 U.S.C. § 1367(a)) (prohibiting retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this Act").

[12] Pub. L. No. 94-580, sec. 2, § 7001(a), 90 Stat. 2795, 2824 (1976) (42 U.S.C. § 6971(a)) (prohibiting retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this Act").

[13] Pub. L. No. 97-470, § 505(a), 96 Stat. 2583, 2598 (1983) (29 U.S.C. § 1855(a)) (prohibiting retaliation against any worker who has "filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act").

[14] Pub. L. No. 100-347, § 3(4)(A), 102 Stat. 646, 647 (1988) (29 U.S.C. § 2002(4)(A)) (prohibiting retaliation against any employee who has "filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act").

[15] Pub. L. No. 101-649, § 534(a), 104 Stat. 4978, 5055 (1990) (8 U.S.C. § 1324b(a)(5)) (prohibiting retaliation against any individual who "intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section").

Surface Transportation Assistance Act;[16] and the Workforce Investment Act.[17] Kasten is thus wrong that the language Congress used in § 215(a)(3) is simply a relic of a bygone era of statutory simplicity. Congress's continued use of § 215(a)(3)'s narrow language, despite the ready availability of the broader language it has used in other statutes, shows that Congress appreciates the difference.

Congress has also repeatedly shown itself capable of amending the law when convinced that broader protection is warranted. In 1977, after a divided panel of the D.C. Circuit held that the Mine Safety Act protected internal complaints,[18] Congress amended the statute to make that protection express.[19] In 1992, after the Fifth Circuit held that the Energy Reorganization Act did not protect internal complaints,[20] Congress amended the statute to provide such protection.[21] And as recently as 2007, Congress amended the Federal Rail Safety Act to protect internal complaints,[22] ratifying an earlier Fourth Circuit decision.[23] At least since the Second Circuit held in 1993 that § 215(a)(3) does not protect "informal workplace complaints," Congress has been on notice of this issue.[24] Since that time Congress has amended the FLSA no fewer than 15 times, yet it has not expanded the narrow scope of § 215(a)(3) to protect internal oral complaints.[25] This Court should not do for Congress what Congress has been either unwilling or unable to do itself.

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[16] Pub. L. No. 103-272, sec. 1(e), § 31105(a)(1)(A), 108 Stat. 745, 990 (1994) (49 U.S.C. § 31105(a)(1)(A)(i)) (prohibiting retaliation against any employee who "has filed a complaint or begun a proceeding related to a violation").

[17] Pub. L. No. 105-220, § 184(f), 112 Stat. 936, 1046 (1998) (29 U.S.C. § 2934(f)) (prohibiting retaliation against any individual who "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this title").

[18] *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974).

[19] Pub. L. No. 95-164, sec. 201, § 105(c)(1), 91 Stat. 1290, 1304 (1977) (30 U.S.C. § 815(c)(1)).

[20] *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984).

[21] Pub. L. No. 102-486, sec. 2902(a), § 210(a), 106 Stat. 2776, 3123 (1992) (42 U.S.C. § 5851(a)).

D. The Rule of Lenity Requires A Narrow Construction Of § 215(a)(3).

For the reasons given above, the ordinary tools of statutory construction yield a single, unambiguous conclusion: Section 215(a)(3) does not protect oral complaints to an employer. Even if the statute were ambiguous, however, the ambiguity would have to be construed narrowly because the FLSA imposes criminal liability for willfully violating § 215(a)(3).

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[22] Pub. L. No. 110-53, § 1521, 121 Stat. 266, 445 (2007) (49 U.S.C. § 20109(a)(1)(C)).

[23] *Rayner* v. *Smirl*, 873 F.2d 60 (4th Cir. 1989).

[24] *Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993).

[25] Pub. L. No. 103-329, § 633(d), 108 Stat. 2382, 2428 (1994); Pub. L. No. 104-1, § 203, 109 Stat. 3, 10 (1995); Pub. L. No. 104-26, § 2, 109 Stat. 264, 264 (1995); Pub. L. No. 104-66, § 1102(a), 109 Stat. 707, 722 (1995); Pub. L. No. 104-88, § 340, 109 Stat. 803, 955 (1995); Pub. L. No. 104-174, § 1, 110 Stat. 1553, 1553 (1996); Pub. L. No. 104-188, § 2105, 110 Stat. 1755, 1929 (1996); Pub. L. No. 105-78, § 105, 111 Stat. 1467, 1477 (1997); Pub. L. No. 105-221, § 2, 112 Stat. 1248, 1248 (1998); Pub. L. No. 105-334, § 2(a), 112 Stat. 3137, 3137 (1998); Pub. L. No. 106-151, § 1, 113 Stat. 1731, 1731 (1999); Pub. L. No. 106-202, § 2, 114 Stat. 308, 308 (2000); Pub. L. No. 108-199, § 108, 118 Stat. 3, 236 (2004); Pub. L. No. 110-28, §§ 8101–8104, 121 Stat. 112, 188–89 (2007); Pub. L. No. 110-233, § 302(a), 122 Stat. 881, 920 (2008).

§ 216(a) (imposing criminal liability upon "[a]ny person who willfully violates any of the provisions of section 215").

Statutes imposing criminal liability for retaliation are exceedingly rare. Saint-Gobain has found only one other retaliation provision that gives rise to criminal liability.[26] Otherwise § 215(a)(3) appears to be unique in the law. Even when Congress has modeled other statutes on the FLSA, it has declined to incorporate the FLSA's criminal penalties. See *Lorillard* v. *Pons*, 434 U.S. 575, 578, 582 (1978) (noting that although Congress provided that "violations of the ADEA generally are to be treated as violations of the FLSA," it "expressly declined to incorporate into the ADEA the criminal penalties established for violations of the FLSA").

Because § 215(a)(3) gives rise to potential criminal liability, "it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408 (2003) (internal quotation marks omitted). "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain," but "also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

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[26] Like the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act makes it a criminal offense to willfully violate the statute's retaliation provision. 29 U.S.C. §§ 1851, 1855. That provision contains an important limitation not present in § 215(a)(3): It prohibits retaliation only when a worker engages in protected conduct "with just cause." *Id.* § 1855.

This Court has previously applied the rule of lenity to the FLSA. In *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), the Court held that the "unit of prosecution" for a violation of the FLSA is a course of conduct, not every breach of an employer's duty. *Id.* at 221, 224. Because Congress had not spoken to the issue in "clear and definite" language, the Court construed the statute narrowly, reasoning that "criminal outlawry" should not be derived from "some ambiguous implication." *Id.* at 221–22; see also *United States* v. *Rosenwasser*, 323 U.S. 360, 363 (1945) (Congress must "inform employers with definiteness and certainty" of the scope of the FLSA before criminal liability can be imposed).[27]

The Court should do the same here, particularly in light of the FLSA's expansive reach. The FLSA was at the time—and in many respects still is—an extraordinary federal intrusion into the workplace. It is highly unlikely that Congress in 1938 intended to expose employers to potential federal criminal liability every time an employee claims that he has been disciplined because he complained to his supervisor about the calculation of his wages or hours. Certainly had that been Congress's intent, it was incumbent upon Congress to express it more clearly. See *Jones* v. *United States*, 529 U.S. 848, 858 (2000) ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes"); *A.B. Kirschbaum Co.* v. *Walling*, 316 U.S.

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[27] In this Court's only prior case construing § 215(a)(3), the rule of lenity was not an issue because the question presented involved only the remedies available in a civil action, not the scope of § 215(a)(3)'s substantive prohibition. *DeMario Jewelry*, 361 U.S. at 296 (holding that courts may order reimbursement for lost wages).

517, 522 (1942) ("[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.").

Nor does it matter that this is a civil action and not a criminal prosecution. The rule of lenity still applies, because the Court "must interpret the statute consistently, whether [it] encounter[s] its application in a criminal or noncriminal context." *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n.8 (2004); see also *Santos*, 128 S. Ct. at 2030 (plurality opinion) ("[T]he meaning of words in a statute cannot change with the statute's application."); *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 & n.10 (1992) (plurality opinion) (applying lenity in interpreting a criminal statute invoked in a civil action); *Crandon* v. *United States*, 494 U.S. 152, 168 (1990) (same).

In short, the rule of lenity requires that any ambiguity in § 215(a)(3) be construed narrowly. Kasten and the government instead urge the Court to adopt the broadest possible construction of § 215(a)(3)—one that would require the Court to construe *two* levels of ambiguity against Saint-Gobain by holding *both* that internal complaints are protected *and* that they need not be in writing. To allow this "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Id.* at 178 (Scalia, J., concurring). That is not how penal statutes are construed.

E. Policy Arguments Do Not Justify Extending § 215(a)(3) Beyond Its Plain Terms.

1. Kasten devotes much of his brief to policy arguments for protecting oral complaints, arguing that such protection would serve the FLSA's remedial purposes. Pet. Br. 46–64. The short answer to these arguments is that "it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Because the ordinary meaning of the words Congress used in § 215(a)(3) is clear, this Court need not speculate as to Congress's purpose. And even if a broader retaliation provision might better serve the FLSA's purposes, "it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." *Addison*, 322 U.S. at 617.

Kasten's policy arguments are also unconvincing on their own terms. Most of his arguments pertain to whether an internal complaint must be in writing and are largely moot, since § 215(a)(3) does not protect internal complaints at all. Thus, for example, limiting protection to complaints to a governmental authority would not disadvantage workers with limited English-speaking or writing ability. See Pet. Br. 41–42. Nor would it create "mind-bending problems" as to what constitutes a writing or whether an employer could manufacture a "same-decision defense" when an employee complains both orally and in writing. See *id.* at 61–62. Many of the problems Kasten imagines simply disappear when the statute is properly construed to reach only complaints to a governmental authority—which is just another reason why this Court should decide that preliminary question before worrying about the welter of arguments Kasten puts forward that assume the answer to this issue.

As explained above, moreover, protecting internal complaints would undermine § 215(a)(3)'s information-sharing purpose by discouraging employees from reporting violations to enforcement authorities. Kasten worries that the same problem would arise if oral complaints to an agency were not protected. Pet. Br. 53–58. But that worry need not detain the Court here, as this case does not involve an oral complaint to an agency. In any event, although an oral complaint to an agency would not be protected under § 215(a)(3)'s "filed any complaint" language, it would almost certainly "institut[e] [a] proceeding" within the meaning of § 215(a)(3) and would therefore be protected.[28] In fact, the government admits that when complaints are made to a governmental authority, there is no difference between an oral and written complaint—either is recorded in the Department's database and reviewed for further action. U.S. Br. 15. Interpreting § 215(a)(3) as written thus would not "silence the voice" of aggrieved employees, Pet. Br. 17; "dry up" the flow of information to the agencies, *id.* at 57; or cause any of the other ill effects in Kasten's parade of horribles. Holding that § 215(a)(3) does not protect internal complaints, or that it protects such complaints only when they are in writing, would promote, not frustrate, communication between employees and enforcement officials.

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[28] Contrary to Kasten's suggestion, an internal complaint, whether oral or written, does not "institut[e] [a] proceeding" under § 215(a)(3), even if the employee (unlike Kasten) follows the employer's internal-complaint procedure. As explained, the word "proceeding" in § 215(a)(3) means a judicial or administrative proceeding—one that is "instituted" and may require the employee to "testify." *See Ball*, 228 F.3d at 364 ("The term 'instituted' connotes a formality that does not attend an employee's oral complaint to his supervisor. And certainly, even if such an oral complaint somehow were understood to have instituted a proceeding, such a proceeding would not include the giving of testimony.").

2. Even solely in terms of the oral-versus-written distinction, Kasten's policy arguments do not support a countertextual interpretation of § 215(a)(3). The FLSA has remedial purposes, to be sure. "But no law pursues its purpose at all costs, and the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana* v. *Holder*, 130 S. Ct. 827, 840 (2010) (alteration and internal quotation marks omitted). If the administration of justice were costless and error-free, it would of course be difficult to articulate a legitimate reason why an employer should be able to retaliate against an employee for orally complaining to his supervisor about an alleged violation of the law. Unfortunately, that is not the world we live in. Creating or expanding a cause of action for retaliation imposes significant costs on law-abiding employers—costs that must be weighed against the benefits of a privately enforceable prohibition on retaliation.

Retaliation claims, for example, are easy to make and difficult to defend, as factual disputes will often preclude summary judgment. The irreducible risk of error in the judicial process means that some innocent employers will be punished, and even those that are ultimately vindicated will often be required to spend significant sums defending themselves against nonmeritorious claims. These costs may induce excessive caution in employers, causing them "either to refrain from some legal conduct or to refrain from firing inefficient or disruptive employees." James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. Colo. L. Rev. 91, 111 (1989). Such costs may ultimately be passed on to workers in the form of lower wages or fewer jobs, thereby harming the very class that Congress intended to protect. See *id.* at 122.

Kasten ignores this side of the equation. He argues, for example, that if oral complaints to an employer are not protected, then employers will have a perverse incentive to fire employees immediately after they orally complain. Pet. Br. 51–52. Kasten has not shown that this concern is anything more than theoretical, if it is even that. See Hubbell, *supra*, at 107 ("[F]iring the employee after disclosure serves no rational purpose from the employer's standpoint, unless the continued employment of the whistleblower will be disruptive in other ways."). Retaliation only increases the odds that the employee will take his complaint about the alleged unlawful conduct to enforcement authorities.

More to the point, however, Kasten ignores the equal and opposite perverse incentive underperforming employees would have under his proposed rule to begin grumbling about alleged violations of the law as soon as they see the writing on the wall, or to fabricate such allegations after the fact, for the purpose of bringing suit. See Hubbell, *supra*, at 117 (noting that "retaliatory discharge actions . . . give discharged employees reason to distort the actions of employers to bring their termination within the scope of retaliatory discharge law"). In fact, that is exactly what Kasten did in this case. Filing a complaint with a governmental authority or requiring a writing serves as an initial filter for screening legitimate claims from nonmeritorious ones.

A writing requirement also has other significant benefits. Chief among them is that a written complaint provides clear notice to the employer that the employee has an actual grievance as opposed to a mere question or an amorphous concern. Given the specter of criminal liability under § 215(a)(3), clear notice that an employee is engaged in protected conduct is not too much to ask. A writing also serves valuable evidentiary purposes. Determining whether an employee had an actual grievance or whether instead he simply engaged in the sort of "abstract grumbling" that all agree is not protected is much easier if the complaint is in writing. Cf. Pet. App. 71 (district court characterizing Kasten's alleged complaints as "[a]t most . . . 'abstract grumbling, or an 'amorphous expression of discontent'") (citations omitted). A writing also moots any issue as to the existence, timing, and content of the complaint, thereby avoiding he-said, she-said disputes and allowing the litigation to focus on the ultimate issue of the employer's motivation. A writing requirement thus allows more claims to be resolved at earlier stages in litigation and decreases the incidence of error by factfinders.

Of course, protecting oral complaints to an employer may also have benefits, including some of those identified by Kasten and his *amici*. But that is ultimately beside the point. The point is that the appropriate scope of a cause of action for retaliation is fundamentally a legislative judgment involving the weighing of costs and benefits and inevitable tradeoffs—a judgment that Congress, with its greater access to information and political accountability for its policy choices, is better situated to make than are the courts.

Congress made that judgment when it enacted § 215(a)(3) and limited protection to employees who have "filed any complaint" or "instituted any proceeding" under or related to the Act. In so doing, Congress may well have sought "to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 541 (1983). If the courts reflexively "supply 'more in the same vein,' and mak[e] [their] share of errors, every one of them will carry the statute to where costs exceed benefits." *Id.* Kasten's policy arguments cannot justify expanding § 215(a)(3) beyond its plain terms.

II. THE SECRETARY OF LABOR AND EEOC'S POSITION IS NOT ENTITLED TO DEFERENCE.

1. After applying the ordinary tools of statutory interpretation, § 215(a)(3) is unambiguous: It does not protect oral complaints to an employer. Because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see also *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004) ("[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.").

Even if § 215(a)(3) were ambiguous, however, the government's interpretation still would not be entitled to deference. This Court has identified two prerequisites to *Chevron* deference: It is "warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales* v. *Oregon*, 546 U.S. 243, 255–56 (2006) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001)). Neither requirement is met here.

First, Congress has not delegated authority to the Secretary or EEOC to promulgate binding interpretations of § 215(a)(3). Although the Secretary has authority to issue regulations with respect to various matters under the FLSA, see § 203(l); § 206(a)(2); § 207(e)(3); § 211(c), (d); § 212(d); § 213(a), (e); § 214(a)–(d), Congress did not grant the Secretary either general authority to issue regulations interpreting the Act or specific authority to issue regulations interpreting § 215(a)(3). This is scarcely odd because the provision carries criminal sanctions, which is not normally a matter committed to administrative discretion. The government does not argue to the contrary, and it cites no provision granting either the Secretary or EEOC authority to issue regulations under § 215(a)(3). Cf. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007) (deferring to regulation issued pursuant to specific grant of authority under § 213(a)(15)).

Nor did Congress grant the Secretary or EEOC authority to adjudicate claims under § 215(a)(3). As this Court has explained, the FLSA does not provide "a preliminary administrative process for determining whether the particular situation is within the regulated area," and therefore "puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum*, 316 U.S. at 523; see also *Tenn. Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 604 (1944)

(Frankfurter, J., concurring) ("An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress."). The government's assertion that the Secretary has authoritatively construed § 215(a)(3) "through administrative adjudication," U.S. Br. 16 n.6, is simply wrong.

The only authority either the Secretary or EEOC has with respect to § 215(a)(3) is the power to bring an enforcement action, *i.e.*, to sue for an injunction under § 217. See *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 214 (1959) ("[T]he injunction is the only effective device available to the Secretary when coverage is in doubt and he wishes to establish the availability of the Act to employees not theretofore afforded its protections."). Although the Secretary and EEOC of course must interpret § 215(a)(3) in deciding whether to bring an enforcement action, such interpretations do not receive *Chevron* deference. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (interpretations "contained in . . . enforcement guidelines . . . lack the force of law" and "do not warrant *Chevron*-style deference"); cf. *Gonzales*, 546 U.S. at 264 ("[T]he Attorney General must . . . surely evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference.").

Second, even if Congress had granted the Secretary or EEOC authority to issue binding interpretations of § 215(a)(3), the interpretation they advance here was not promulgated in the exercise of that authority. The government identifies no Department of Labor rule, regulation, order, or even policy statement or guideline reflecting the Secretary's position. Instead, it cites a few appellate briefs and two enforcement actions—both of which involved complaints to an employer in the context of formal administrative proceedings.[29] The Secretary's position is thus solely a litigation position, and as such is not entitled to deference. See *Smiley* v. *Citibank*, 517 U.S. 735, 741 (1996).[30] And the EEOC's position is set forth only in its compliance manual, which this Court has repeatedly held does not receive *Chevron* deference. *Clackamas Gastroenterology Assocs.* v. *Wells*, 538 U.S. 440, 449 n.9 (2003); *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110–11 n.6 (2002); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256–57 (1991).

Because the Secretary and EEOC neither possess nor have exercised any power to issue binding interpretations of § 215(a)(3), their plea for *Chevron* deference is not credible. Perhaps that is why the government did not ask for *Chevron* deference below. Pet. App. 59 (asking only for deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). And perhaps that is why Kasten himself invokes only *Skidmore*. Pet. Br. 64.

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[29] In *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the complainant was discharged for protesting her employer's attempt to skirt its agreement with the Department of Labor to pay back wages for violations discovered during a Department of Labor investigation. *Id.* at 180–81. And in *Goldberg* v. *Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, the complainant was discharged because the Department of Labor had initiated an investigation and the complainant "had supported this proceeding and insisted upon prompt payment of back wages due him under the Act." *Id.* at 40,986.

[30] The government cites *Long Island Care at Home, Ltd.* v. *Coke* and *Auer* v. *Robbins*, 519 U.S. 452 (1997), for the proposition that an agency interpretation advanced in a brief receives deference. Both cases involved an agency's interpretation of *its own regulations*, not, as here, an agency's interpretation of the statute itself. *Long Island Care*, 551 U.S. at 171; *Auer*, 519 U.S. at 462–63.

2. For these reasons, the most the Secretary and EEOC could possibly claim for their position is *Skidmore* deference. But they are not entitled to that either. *Skidmore* deference applies only when the agency's interpretation has "power to persuade, if lacking power to control." 323 U.S. at 140. And for all the reasons outlined above, the government's position is not a persuasive interpretation of § 215(a)(3). Because the government's interpretation is "clearly wrong," this Court need "neither defer nor settle on any degree of deference." *Gen. Dynamics,* 540 U.S. at 600; see also *Ky. Ret. Sys.* v. *EEOC,* 128 S. Ct. 2361, 2371 (2008) (declining to give *Skidmore* deference to unpersuasive agency position); *Gonzales,* 546 U.S. at 269 (same); *Christensen,* 529 U.S. at 587 (same); *Arabian Am. Oil,* 499 U.S. at 257–58 (same).

Deference is particularly unwarranted here because the question presented is a straightforward issue of statutory interpretation, not a complex or technical issue calling for an exercise of agency expertise. Cf. *Mead,* 533 U.S. at 235 ("There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions presented in this case."). Nothing in the Secretary's or EEOC's statutory mandate or regulatory experience renders them uniquely qualified to say what the phrase "filed any complaint" means.

Finally, as discussed above, this case involves a criminal statute. When a criminal statute is ambiguous and an agency adopts a broad interpretation, principles of agency deference collide with the rule of lenity, which ordinarily requires ambiguity in a criminal statute to be construed narrowly. Although this Court has not addressed whether the rule of lenity trumps agency deference as a general matter,[31] it has held that canons of statutory construction—of which the rule of lenity is a cardinal one—precede agency deference in resolving facial ambiguities. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (canon of constitutional avoidance displaces agency deference); *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (canon against "federal encroachment upon a traditional state power" displaces agency deference).

This approach makes sense. The government's interpretation of criminal statutes traditionally receives skepticism, not deference. "Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts." *Dolfi* v. *Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998); see also *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (Starr, J.) (lenity renders interpretation of statute of limitations "far outside *Chevron* territory"). At a minimum, an agency position adopting the broadest possible interpretation of a criminal statute without any apparent consideration of the rule of lenity or the values it embodies is seriously flawed and lacks power to persuade.

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[31] This Court has stated that "some degree of deference" is owed to an agency's reasonable interpretation of a criminal statute when Congress has given the agency "latitude . . . in enforcing the statute," a high "degree of regulatory expertise [is] necessary to its enforcement," and the agency's interpretation is embodied in a longstanding regulation. *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 & n.18 (1995). None of these conditions obtains here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 16, 2010

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REPLY
BRIEF

No. 09-834

In the
Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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REPLY BRIEF FOR PETITIONER

Respondent advances an unworkable rendition of 29 U.S.C. § 215(a)(3), which would discourage communication between employees and employers, frustrate voluntary compliance with the Fair Labor Standards Act ("FLSA"), increase dependence on governmental intrusions in the employee-employer relationship, and strike fear into victims of violations of the Act who wish to enforce their rights. Respondent's arguments against protection for oral complaints of FLSA violations are unpersuasive because the otherwise ambiguous term "filed," when understood in the statutory and historical context of the FLSA with the remedial purposes of the Act in mind, can only be interpreted to encompass oral complaints.

Perhaps recognizing that its position on oral complaints is untenable, respondent raises a new untimely issue: whether internal complaints to employers are protected. Respondent did not raise this question at the certiorari stage, and it should not be considered now that the Department of Labor and Equal Employment Opportunity Commission ("EEOC") have been denied the opportunity to present written argument on this issue. However, if the Court addresses whether internal complaints are protected, it should answer this question in the affirmative to encourage informal resolution of FLSA violations and voluntary compliance.

The conclusion that section 215(a)(3) protects both oral and internal complaints to an employer is bolstered by the fact that the Department of Labor (charged with enforcing the FLSA) and the EEOC (charged with enforcing the Equal Pay Act ("EPA"), to which section 215(a)(3) applies) both hold the long-standing position that internal and oral complaints are protected. Since the Department has rulemaking authority for similar statutes using nearly identical anti-retaliation language, and it has promulgated formal regulations defining protected activity to encompass oral and internal complaints under those statutes, a particularly high degree of deference to the agency's interpretation of section 215(a)(3) is warranted. Oral and internal complaints should be protected.

Respondent's attempt to apply the rule of lenity to narrowly construe section 215(a)(3) against employees is unavailing. Since the rule of lenity arguably applies only to 29 U.S.C. § 216(a)'s criminal provision, it does not affect the interpretation of section 215(a)(3) in this case.

In sum, section 215(a)(3) of the FLSA protects oral complaints to employers. Accordingly, the judgments of the district court and the court of appeals should be reversed, and this case should be remanded for a trial on the merits.

I. SECTION 215(a)(3) PROTECTS ORAL COMPLAINTS.

A. The Word "File" Is Ambiguous.

In the face of a litany of examples of statutes, judicial opinions, and administrative regulations and opinions which use the verb "file" to describe what was done with an oral statement, respondent insists that the verb "file" is "clear" and "unambiguous," and that "by definition" its "plain meaning" "clearly contemplates" that the thing filed "must be a document." (Resp't. Br. at 11, 25–27, 48.) Respondent dismisses use of the term "file" with relation to oral statements as "colloquial." (*Id.* at 28.) However, the examples in petitioner's opening brief are from federal and state agencies, federal and state judges, and state legislatures. Judge Flaum himself, the author of the Seventh Circuit panel opinion in the instant case, who insisted that "file" must refer to a document, used the word in an earlier opinion to refer to an oral statement. *See NLRB v. Sw. Elec. Co-op., Inc.*, 794 F.2d 276, 279 (7th Cir. 1986); *see also Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 725 (7th Cir. 2009). Thus, one commonly accepted use of the verb "file" in the legal context attaches an oral statement as its direct object.

Even if "file" commonly encompasses oral statements in legal contexts, respondent argues that Congress itself has never expressly used such a phrase. (Resp't Br. at 29.) However, when Congress drafts legislation, it uses language spoken by the public, particularly when the bill pertains to the general workplace and not to a technical matter requiring specialized terms of art. Congress also frequently leaves the task of interpreting ambiguous terms to administrative agencies, and many regulations expressly state that oral statements can be "filed." (*See* Pet'r Br. at 26, n.15.)

The phrases "file a written" and "file an oral" are commonly used in various legal contexts. Respondent dismisses this phenomenon as a series of mistakes, claiming that the phrase "file a written" is redundant, and "file an oral" is simply poor grammar which "departs from [the] ordinary meaning" of "file" as respondent defines it. (Resp't Br. at 28, 30–31.) To the contrary, the more plausible explanation is that the drafter understood "file" to refer to either a document or an oral statement, and chose to specify which interpretation should apply.

As petitioner explained in his opening brief, when Congress intends a complaint to be filed "in writing," it expressly says so. (*See* Pet'r Br. at 39, n.28.) If Congress fails to use a clarifying adjective (like "oral" or "written"), it does not lead to the presumption that Congress intended to reject one possible meaning and not the other, as respondent claims. "File," standing alone, is ambiguous and can only be understood in light of the history, purpose, and text of the statue, with appropriate deference afforded to the administrative agency's interpretation.

Respondent asserts that Congress could have used language that more "clearly" encompasses oral complaints. (Resp't Br. at 27.) It claims that Congress, instead of saying "filed any complaint," "could have written 'made a complaint.'" (*Id.*) However, when the FLSA was written, the Attorney General's Office, Secretary of Labor, and members of Congress all regarded "filed any complaint" and "made a complaint" as synonymous. (U.S. Br. at 21.) Further, it was just as possible for Congress to expressly say that only "written" complaints were protected, rather than affording protection for "any" complaint. (*See* Pet'r Br. at 39, n.28.) Thus, the term "file" is ambiguous and may include oral complaints.

B. The Phrase "Filed Any Complaint" Includes Oral Complaints.

Respondent correctly notes that the statutory context of "filed any complaint" sheds light on its meaning. Nevertheless, respondent's analysis of the statute is limited to a linguistic evaluation of the words "file" and "complaint" divorced of the surrounding language in section 215(a)(3), and consideration of the purposes and subject of the FLSA as a whole. (Resp't Br. at 26, 30.)

In construing "filed any complaint," it is of central importance **who** is providing the information being "filed," **to whom** the information is directed, and **what** sort of information is conveyed. Here, the source of the information is generally an ordinary worker, the recipient usually is a supervisor or human resources official, and the subject of a complaint typically includes an alleged failure to pay for work time, overtime, or minimum wage. In a typical situation involving such issues, a worker who wants to file a complaint would simply approach a corporate official to discuss the matter.[1] In using the phrase "filed any complaint," Congress would have known that these were the likely circumstances in which a complaint would be filed, and would have intended that they be protected.

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[1] (*See* Pet'r Br. at 41, n.30; *see also* Dkt. # 91, Ex. 12 at 3 ("Contact your supervisor immediately."); Dkt. # 93, Ex. 25 at 3 ("Your supervisor is responsible for . . . wage administration.").)

The language within section 215(a)(3) itself indicates that oral complaints are protected. Section 215(a)(3) forbids reprisals against workers who engage in a range of actions designed to facilitate implementation of the FLSA. There is nothing about oral complaints that are somehow less efficacious or less likely to trigger reprisals than written complaints. The other actions that section 215(a)(3) protects are not limited to written matters; it is also unlawful under that provision to retaliate against an employee who "has testified" in a proceeding related to the FLSA. There is no indication that Congress intended to protect only written and not oral complaints in this context.

Rather than examine the statutory context of section 215(a)(3) itself, respondent turns to the use of "file" in other provisions. In the context of those provisions, the object of the verb "file" is expressly described as a written document: either a government report[2] or a litigation document.[3] (Resp't Br. at 26.) This does not demonstrate that in those other provisions "file" standing alone means "file government report or litigation document." On the other hand, if "file" in section 215(a)(3) can only refer to the same things that "file" refers to elsewhere in the Act, it would not encompass an informal letter to the Department of Labor, or participation in a study conducted by the Department or investigation by the EEOC. Such communications would not rise to the level of formality respondent seeks.

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[2] *See* 29 U.S.C. §§ 203(1), 214(c)(5)(A).

[3] 29 U.S.C. §§ 210(a)–(b), 214(c)(5)(A), 216(b)–(c).

Respondent also contends that section 215(a)(3) of the Fair Labor Standards Act of 1938 is best understood by comparison to anti-retaliation provisions adopted decades later between 1964 and 2008. (Resp't Br. at 33–39.) However, the Congress which framed section 215(a)(3) obviously could not chose the between the language of section 215(a)(3) and the language used in anti-retaliation provisions that were not enacted until between three and seven decades later. The more recently enacted statutes upon which respondent relies are also poor comparators because they clearly go beyond protecting complaints. Title VII and the Age Discrimination in Employment Act forbid retaliation against employees who silently "opposed any practice" that is unlawful under those statutes. (*See* P. App. 42.) Since those provisions are not intended to echo section 215(a)(3)'s anti-retaliation protections, they are inappropriate comparators.

Respondent also fails to adequately address the practical problems that its proposed interpretation creates. Respondent does not explain how the Court should draw the line between protected and unprotected complaints when evaluating whether a complaint is "formal" enough or is "written" in an acceptable format based upon respondent's definition of "file." (*See* Pet'r Br. 60–63; P. App. 71.) For example, when a worker's oral complaint is memorialized in writing by an employer or federal agency (as in this case), respondent's argument presents inconsistencies. Respondent simultaneously claims that oral complaints are not protected, but that complaints to the government are protected, because:

> the government admits that when complaints are made to a governmental authority, there is no difference between an oral and written complaint--either is recorded in the Department's database and reviewed for further action.

(Resp't Br. at 44.) This seems to indicate that a worker's oral complaint would indeed be protected under section 215(a)(3) if it were subsequently memorialized in writing by the recipient. However, that is precisely what occurred in this case; the employer memorialized petitioner's complaints multiple times. (*See* Pet'r Br. at 9–10, nn.4, 6; U.S. Br. at 25, n.11.) Respondent cannot reconcile its arguments with its position on the facts of this case.

Further, the government expressed concern that a worker could be fired for orally complaining to a federal agency if the Seventh Circuit's decision stands. (U.S. Br. at 25.) Respondent acknowledges that under its interpretation, "an oral complaint to an agency would not be protected under § 215(a)(3)'s 'filed any complaint' language." (Resp't Br. at 44.) Nonetheless, respondent declares that an "oral complaint to an agency . . . would almost certainly 'institut[e] [a] proceeding' within the meaning of § 215(a)(3) and would therefore be protected." (*Id.* at 44.) This rationale cannot withstand analysis. (*See* Pet'r Br. in Reply in Supp. of Cert. at 4–5.) Assuming that a Labor Department investigation is a "proceeding," the Department official who commences the investigation "institute[s]" the investigation, not an employee.[4]

Further, respondent claims that the term "proceeding" pertains only to actions that "may require the employee to 'testify,'" but fails to address the fact that employees providing information to the Labor Department are frequently not "testify[ing]." Even if an agency investigation or study is a "proceeding," and even if the complaining employee can "institute" it, section 213(a)(3) would not apply if the Department decides not to pursue the matter, or if the employee reported violations to federal officials during the course of a study or investigation instituted by another employee.

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[4] *See Heckler v. Chaney*, 470 U.S. 831, 834–35 (1985) (recognizing a "presumption that agency decisions not to **institute proceedings** [in response to complaints or inquires] are unreviewable" (emphasis added)). Congress expressly rejected language which would have made the "institut[e] [a] proceeding" clause applicable to workers who contacted the Department. 83 Cong. Rec. 7,377 (1938) (remarks of Rep. Ramspeck) (rejecting protection for employees who "instituted or caused to be instituted any investigation or proceeding").

Respondent contends that denying section 215(a)(3) protection to oral complaints will force workers to memorialize complaints, thus assuring that employers know the precise nature of that complaint and can provide an "initial filter for screening legitimate claims from nonmeritorious ones." (Resp't Br. at 47.) This argument seems to legitimize written complaints to the employer itself—complaints for which respondent simultaneously claims employees can be promptly terminated.[5]

Further, permitting employers to fire employees who complain orally is unlikely to increase the documentation of complaints as respondent claims, and is more likely to suppress employee complaints altogether. It is highly unlikely that most employees would complain about FLSA violations if they are aware that they may legally be terminated. Even if the Labor Department issued a public information campaign to warn workers that they can be dismissed for oral complaints or complaints to an employer, the undesirable impact of that warning would likely be to deter complaints.

In any case, respondent suggests that there is no need to forbid dismissal of workers who complain orally to their employers, because no rational employer would do such a thing. Setting aside the allegations of the instant case, respondent insists that it would "serve[] no rational purpose from the employer's standpoint" to retaliate against a worker like petitioner, since doing so would "only increase[] the odds the employee will take his complaint about the alleged unlawful conduct to enforcement authorities." (Resp't Br. at 46.) Congress is well-familiar with the realities of the workplace, and enacted dozens of federal statutes forbidding reprisals for internal complaints in the last few decades. The FLSA should not be narrowly construed on the theory that the last forty years of congressional legislation is based on a misunderstanding of employer practices. Respondent's claims that section 215(a)(3) should be narrowly construed are therefore unavailing, and oral complaints should be acknowledged as protected conduct.

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[5] Respondent's own employee handbook expressly requests that workers raise complaints orally to their supervisors or human resources. (Pet'r Br. at 3–5.)

II. THIS COURT SHOULD NOT ADDRESS A NEW ISSUE RESPONDENT RAISED FOR THE FIRST TIME IN ITS BRIEF ON THE MERITS.

Respondent next improperly raises an issue that it failed to address at the certiorari stage: whether complaints to an employer are protected. If respondent wanted this Court to address this issue because it was resolved against respondent in the lower court, it should have filed a cross-petition pursuant to Supreme Court Rule 12.5. Moreover, respondent was "admonished that [it had] an obligation to the Court to point out in the brief in opposition [to certiorari], **and not later**, any perceived misstatement made in the petition." Sp. Ct. R. 15.2 (emphasis added). "Any objection to consideration of a question presented based on what occurred in the proceedings below . . . may be **deemed waived** [when it is not] called to the Court's attention in the brief in opposition." *Id.* (emphasis added). Rules 12.5 and 15.2 set forth a deliberately structured process so that the Court can adequately decide in advance whether to hear an additional issue, and litigants and amici curiae know what arguments to present in their briefs and at oral argument.

Because respondent failed to timely raise this issue, petitioner and his amici curiae are at a material disadvantage. Petitioner was denied the opportunity to address these arguments in an opposition to a cross-petition for certiorari and in his opening brief. Petitioner's amici curiae were also not afforded notice that the new issue may be presented. Both the Department of Labor and the EEOC have an established position that section 215(a)(3) protects workers who complain to their employers, but the Solicitor General has been denied the opportunity to present a written argument in support of that position. Petitioner and his amici are also uninformed as to whether the Court will consider this issue at oral argument.

Respondent should not be rewarded by

gaining a litigation advantage as a result of its disregard for this Court's established procedures. Respondent previously objected to the Court reviewing this very issue, and now contradicts its own prior arguments. (*See* Resp't Br. in Opp. to Cert. at 16.) Further, this new issue is not inextricably intertwined with the question certified for review, as respondent claims. Whether the phrase "filed any complaint" includes oral complaints is separate and distinct from whether internal complaints are protected. Respondent therefore waived its right to raise this newly-presented question, and it should therefore not be addressed.

III. SECTION 215(a)(3) PROTECTS INTERNAL COMPLAINTS TO EMPLOYERS.

In any case, if the Court considers whether complaints to an employer are protected, it should affirm the Seventh Circuit's decision on this question. Section 215(a)(3) forbids retaliation against an employee because that employee "filed **any** complaint" under the FLSA, which on its face includes both internal and external complaints. 29 U.S.C. § 215(a)(3) (emphasis added). Respondent acknowledges that the ordinary meaning of "complaint" does not depend on the identity of the recipient, and is not limited to complaints filed with government agencies. (Resp't Br. at 16.) Indeed, respondent's own policies encourage workers to "file[] a complaint" internally, rather than contact federal or state officials.[6]

Respondent nevertheless sets aside the term "any" in section 215(a)(3) to assert that "complaint" has a far narrower, "specialized legal meaning" in section 215(a)(3) which includes only a "complaint to the government." (Resp't Br. at 16.) The problem with respondent's assertion is that the "specialized legal meaning" for "complaint" is not just any "complaint to the government," but specifically a formal pleading filed by a plaintiff at the outset of a lawsuit. *See* Fed. R. Civ. P. 8(a); 3 *Oxford English Dictionary* 608 (2d ed. 1989) ("A statement of injury or grievance laid before a court or judicial authority . . . for purposes of prosecution or redress . . . ."), *quoted in* (Resp't Br. at 16).

Respondent proposes a new meaning for "complaint;" one which encompasses both legal pleadings and other types of grievances to government agencies. What those other types of complaints include under respondent's definition is unclear. Respondent inconsistently describes its approved "complaint" as "an official grievance with a governmental authority," a "formal complaint[] filed with a court or administrative agency," and, more broadly, "complaints to governmental authorities." (Resp't Br. at 11, 17, 20, 22, 24.) An e-mail or postcard to the

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[6] (Dkt. # 93, Ex. 25 at 30 ("Retaliation directed at an employee who has filed a complaint or assisted in an investigation is strictly prohibited."),)

Department of Labor stating "my employer is not paying the minimum wage" would fall within the third standard, but probably not the first two.

Respondent argues that "complaint" in section 215(a)(3) should be given the same meaning as in other provisions of the FLSA, which require "an official grievance filed with a governmental authority." (Resp't Br. at 18.) It is unclear what an "official grievance [to a] governmental authority" is, since most protected workers are not government employees. Further, the other three provisions that use the term "complaint" refer only to pleadings in civil actions; they do not relate to complaints conveyed to administrative officials or other parties, as in section 215(a)(3).[7] If the term "complaint" in section 215(a)(3) has same meaning it has elsewhere in the statute, section 215(a)(3) would not protect complaints (written or oral) to the Department of Labor. Such a limited meaning would render the phrase "filed any complaint" meaningless, because the filing of a civil complaint in a court is already covered in the next clause, which protects a worker who

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[7] 29 U.S.C. § 216(b) (stating that the right of employee to bring a civil action "shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217"); § 216(c) (stating that the right of employee to bring a civil action "shall terminate upon the filing of a complaint by the Secretary in an action [to obtain unpaid wages]"); *id.* (stating that the date on which an action "shall be considered to be commenced . . . [is] the date when the complaint is filed if [the Secretary] is named as a party plaintiff").

"institute[s] any proceeding under or related to this chapter." 29 U.S.C. § 215(a)(3). Since a "basic principle of statutory interpretation is that courts should 'give effect, if possible, to every clause and word of a statute, avoiding . . . any construction which implies that the legislature was ignorant of the meaning of the language it employed," respondent's argument must be rejected. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

Respondent next urges the Court to interpret "filed any complaint" to include only conduct similar to that which is protected by the other provisions of section 215(a)(3). (Resp't Br. at 18.) The other provisions of section 215(a)(3) protect instituting or testifying in "any proceeding under or related to this chapter." That language, however, includes non-governmental proceedings. Arbitration, for example, is repeatedly referenced in the United States Code as a proceeding, and it involves testimony.[8]

Respondent instead urges that the term "proceeding" in section 215(a)(3) can only have the meaning that it has elsewhere in the FLSA. (Resp't Br. at 18–19.) However, elsewhere in the FLSA, "proceeding" refers only to judicial proceedings,[9] hearings before an administrative law judge,[10] or quasi-legislative actions of committees establishing wage rates.[11] If "complaint" in section 215(a)(3) is no broader than this proposed narrow definition of "proceeding," a worker's complaint to the Department of Labor would not be protected. This interpretation cannot be correct.

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[8] *See, e.g.*, 5 U.S.C. §§ 577(a), 579, 580(a)–(d), 581(a); 7 U.S.C. § 361a(c)(1)(F)(iii); 8 U.S.C. § 1182(n)(5)(C); 15 U.S.C. § 78o-3(i)(5); *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

[9] 29 U.S.C. §§ 207(o)(6)(A)(iii), 210(b), 216(d), 216b, 217.

According to respondent, protecting internal complaints would have the undesirable effect of "discouraging employees from reporting violations to enforcement authorities." (Resp't Br. at 44.) This argument essentially amounts to an assertion that employers that openly fire employees who report FLSA violations are performing a public service because other aggrieved workers would be more likely to bypass perilous internal procedures and go directly to the government. However, the purpose of the FLSA was to assure fair compensation to covered employees—a goal that is advanced when internal complaints lead to voluntary compliance. *See* 29 U.S.C. § 202(b). Respondent's argument therefore undermines the entire statutory scheme, by attempting to justify employers that perpetuate violations until government intervention is required.

Finally, dismissing employees who file internal complaints also will not "promote" communication with federal officials unless workers actually know that only complaints to the government (and not to management) are protected. There is no realistic possibility that most workers would ever learn of such a construction of section 215(a)(3). Instead, employees would likely either be aware that retaliation for reporting FLSA violations may be lawful and avoid complaining altogether, or be terminated because they unsuspectingly followed an employer's complaint policy by filing an internal complaint of violations in good faith. In order to effectuate the purpose of the FLSA—and secure employers' voluntary compliance and the free-flow of information between employees, employers, and the Department of labor—internal complaints to employers must therefore be protected.

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[10] §§ 214(c)(5)(C), 216(e)(4).

[11] § 210(a).

IV. THE SECRETARY OF LABOR AND THE EEOC'S INTERPRETATION OF SECTION 215(a)(3) IS ENTITLED TO DEFERENCE.

Respondent errs in asserting that the EEOC and the Department of Labor—the agencies charged with administration of the FLSA and EPA—should not be afforded any deference in their interpretations of 29 U.S.C. § 215(a)(3). Respondent misapprehends both the nature and basis of the deference that may be accorded to an agency's interpretation of a statute which it administers. As this Court explained in *United States v. Mead Corp.*:

> The fair measure of deference to an agency administering its own

> statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other.

533 U.S. 218, 234 (2001). Hence, the amount of deference accorded an agency's position turns not only on the cogency of its arguments, but also on a number of other important considerations.

This case presents unusual and compelling circumstances warranting an extremely high degree of deference. Although the Department does not have legislative rulemaking authority to issue regulations implementing section 215(a)(3), it does have that authority for several other virtually identically-worded provisions in other statutes, and has promulgated formal regulations interpreting "complaint" to encompass oral complaints.[12] For example, the Occupational

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[12] *See also* National Transit Systems Security Act, 6 U.S.C. § 1142(a)(3) (prohibiting retaliation because an employee "file[d] a complaint"); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b)(1) (allowing employees who were discharged in retaliation to "file . . . a complaint with the Secretary of Labor."); Federal Railroad Safety Act, 49 U.S.C. § 20109(a)(3)

Safety and Health Act forbids retaliation against an employee who has "filed any complaint." 29 U.S.C. § 660(c)(1). The implementing regulation protects employees who "lodg[e] complaints . . . with their employers," as well as oral complaints. 29 C.F.R. § 1977.9(c). Likewise, the Surface Transportation Assistance Act also prohibits reprisals against a worker because the worker "filed a complaint." 49 U.S.C. § 31105(a)(1)(A)(i); *see also* 29 C.F.R. §§ 1978.102(b)(1), 1978.102(e)(1). On August 31, 2010, the Department issued an interim final rule which defines "complaint" to "include[] both written and oral complaints to employers and/or government agencies." 29 C.F.R. § 1978.101(g); 29 C.F.R. § 1978.103(b); *see also* 75 Fed. Reg. 53,547 (Aug. 10, 2010). These regulations are all entitled to *Chevron* deference. *See also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (affording deference to an agency's interpretation of the statute it administers).

The regulations defining "filed any complaint" to include protection for oral complaints to employers give particular force to the Secretary's identical interpretation of virtually identical language in section 215(a)(3). Failure to defer to the Secretary's

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(same); 29 C.F.R. § 1982.103 (stating that "[c]omplaints filed [pursuant to 6 U.S.C. § 1142(a)(3) or 49 U.S.C. § 20109(a)(3)] . . . may be either oral or in writing"); 29 C.F.R. § 1983.103 (interpreting 15 U.S.C. § 2087 to include complaints that are "either oral or in writing").

interpretation of section 215(a)(3) would have the untoward result of creating conflicting judicial interpretations of the same language in statutes administered by the same Department, and would undermine the Department's formal regulatory efforts.

Several other factors also favor a high degree of deference. For almost half a century, the Secretary of Labor has construed section 215(a)(3) to apply to oral and internal complaints. (U.S. Br. at 29–31.) The EEOC construes section 215(a)(3) in the same manner. (*Id.*) By setting forth their interpretation of the phrase "filed any complaint," the Secretary and the EEOC have acted squarely within their clearly delegated areas of expertise.[13] The concurrent view of two independent federal agencies on the interpretation of a statute they both administer is entitled to a high degree of deference.

V. THE RULE OF LENITY DOES NOT REQUIRE THE NARROW INTERPRETATION OF SECTION 215(a)(3) RESPONDENT ASSERTS.

For half a century this Court has also "consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)). Conversely, the Court has repeatedly held that exemptions to the FLSA "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

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[13] *See* 29 U.S.C. §§ 204(a)–(b), 206(d), 216(b)–(c); *see also* § 204(d) (requiring the Secretary to issue expert reports advising Congress regarding results of studies on labor conditions and FLSA enforcement); §§ 209, 211 (requiring the EEOC to conduct studies, investigations, and inspections of workplace conditions and practices, and issue certain regulations).

Respondent urges the Court to abandon five decades of interpretation and hold that section 215(a)(3)'s protection must be denied whenever there is "any ambiguity" in the statutory language. In the instant case, respondent asks only that this new approach, based on the rule of lenity, be applied to section 215(a)(3). However, section 216(a) of the FLSA, which imposes criminal sanctions for a "willful" violation of **any** provision in section 215, applies to the **entire** statute, since violations of the various substantive provisions of the FLSA are all encompassed within section 215. Thus, application of the rule of lenity could upset the FLSA's entire history of statutory construction, which has been to construe the FLSA's protections liberally in employees' favor. Respondent is now asking the Court to do an about-face, and construe the whole of the FLSA in the employer-defendant's favor.

Accepting respondent's contentions would also lead to perverse results. Section 215 categorizes a vast number of possible violations of the FLSA's minimum wage and overtime requirements, child labor laws, anti-retaliation provisions, agency investigation cooperation requirements, and record-keeping and reporting provisions, among other potential violations. 29 U.S.C. § 215. For example, if an employer engages in "oppressive child labor" in violation of 29 U.S.C. § 212(c), civil statutes prohibiting this conduct would be perversely construed against the child-victim, and in favor of the offending defendant. Moreover, as respondent acknowledges, a number of other statutes use similar language in the civil context and do not attach criminal penalties to violations. (*See* Resp't Br. at 40.) The presence of criminal penalties in the FLSA indicates congressional intent to increase protections for workers in this context, not decrease them. Respondent's position has the paradoxical effect of creating greater exposure of harm to workers under the FLSA when the whole point of the Act is to ensure protections for employees and punish violators of the FLSA.

The Court need not come to Respondent's proposed conclusion. Since section 216(a) is the only penal statute in the FLSA, the Court's application of the rule of lenity only applies to its provisions, and not to section 215. "The rule of lenity requires ambiguous **criminal laws** to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 128 S. Ct. 2020, 2025 (2008) (emphasis added).

Section 216(a) authorizes the imposition of criminal sanctions only when a criminal defendant "willfully violates" the provisions of section 215. In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), this Court held that the "willfulness" requirement in section 255(a) of the Act, which affects the applicable statute of limitations in civil cases, requires proof that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." The imposition of a "willfulness" requirement in section 216(a) alleviates any concerns underlying the rule of lenity, since any ambiguity in section 215(a)(3) would constitute a complete defense to criminal liability under 29 U.S.C. § 216(a); a defendant cannot "willfully" violate a provision of the FLSA if the meaning of the statute is unclear. Thus, respondent's asserted concerns regarding criminal sanctions are easily assuaged by the plain language of section 216(a).

Section 216(a)'s "willfulness" requirement also represents the considered judgment of Congress regarding the resolution of ambiguities in the FLSA's complex regulatory scheme. To avoid the possibility that employers might be criminally sanctioned for violating an ambiguous provision, Congress limited section 216(a) to cases in which a defendant was fairly forewarned in advance that its conduct could potentially violate the FLSA. There is therefore no need to apply the rule of lenity to section 215, because Congress already side-stepped concerns regarding inadequate notice to criminal defendants by inserting the "willfulness" mandate into section 216(a).

Moreover, the rule of lenity does not override deference to the administrative agencies in their interpretations of section 215(a)(3). In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704, n.18 (2005), this Court expressly rejected the contention that "the rule of lenity should foreclose any deference [to an administrative agency's interpretation] . . . because the statute includes criminal penalties," and deferred to the agency's interpretation of the statute when "adequate notice of potential liability," had "existed for two decades," and the statute gave "fair warning of its consequences."[14] Here, as in *Babbitt*, the Secretary has held the same interpretation of section 215(a)(3) for decades. (U.S. Br. at 29–31.) Respondent does not seriously assert that employers have no idea that they could possibly be violating the FLSA if they terminate employees for complaining about violations. At a minimum, most employers are aware that there could potentially be something unlawful about such conduct. There is therefore a sufficiently "fair warning" that criminal liability could possibly attach for willful violations of section 215(a)(3).

---

[14] *See also Brown* v. *McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005); *O'Donald* v. *Johns*, 402 F.3d 172, 174 (3d Cir. 2005), *cert. denied*, 547 U.S. 1106 (2006); *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005).

Further, there is no "grievous ambiguity" sufficient to invoke the rule of lenity here. Respondent suggests that the rule of lenity applies whenever the language of a statute leaves "any ambiguity." (Resp't Br. at 13, 39, 40.) That is not correct:

> The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. "The rule of lenity applies only if, 'after seizing everything form which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" To invoke the rule, we must conclude that there is a "grievous ambiguity or uncertainty" in the statute.

Muscarello v. United States, 524 U.S. 125, 138 (1998) (citations omitted). Accordingly, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute,' such that the Court must simply 'guess as to what Congress intended.'" *Barber v. Thomas*, 130 S. Ct. 2499, 2501 (2010) (quoting *Muscarello*, 524 U.S. at 139 and *Ladner v. United States*, 358 U.S. 169, 178 (1958)). In the instant case, ordinary methods of statutory construction, including consideration of the degree of deference warranted by the circumstances, are easily sufficient to resolve the disputed legal issues in favor of petitioner. Thus, the rule of lenity does not give rise to a narrow construction of section 215(a)(3) in respondent's favor.

CONCLUSION

For the foregoing reasons, the phrase "filed any complaint" in 29 U.S.C. § 215(a)(3) protects oral complaints to an employer. Summary judgment and the decision of the court of appeals should be reversed on this issue, and this case should be remanded for trial.

Respectfully submitted this 14th day of September, 2010.

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As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,883 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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BRIEF

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In the Supreme Court of the United States

KEVIN KASTEN, PETITIONER

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Fair Labor Standards Act of 1938, 29 U.S.C. 215(a)(3), makes it unlawful, *inter alia*, for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint." The question presented is whether Section 215(a)(3) prevents an employer from discharging an employee for orally complaining about suspected violations of the Act.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question of whether the anti-retaliation provision of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 215(a)(3), protects an employee who complains to his employer orally, rather than in writing, about suspected violations of the Act. The United States has a significant interest in the resolution of that question. The Secretary of Labor is responsible for enforcing the FLSA, including its anti-retaliation provision. See 29 U.S.C. 204(a) and (b), 216(b) and (c). In addition, the Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), which is codified as part of the FLSA and covered by the same anti-retaliation provision. Proper enforcement of the FLSA's anti-retaliation provision is thus critical to ensuring compliance with both the FLSA and the EPA.

STATEMENT

1. In 1938, Congress enacted the Fair Labor Standards Act to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). To address substandard working conditions, Congress required employers covered by the FLSA to pay their employees a minimum wage for all hours worked. 29 U.S.C. 206 (2006 & Supp. II 2008). It also required employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207.

To protect employees who report suspected violations of those minimum wage and overtime pay requirements, Congress provided that

> it shall be unlawful for any person * * * to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. 215(a)(3). The question presented here is whether an employee who orally complains to his employer about suspected violations of the FLSA has "filed [a] complaint" within the meaning of the Act, and is thus protected against retaliation by his employer.

2. From October 2003 to December 2006, petitioner was employed by respondent Saint-Gobain Performance

Plastics Corporation as an hourly production worker at its facility in Portage, Wisconsin. In order to record his hours worked, petitioner was required to swipe a time card on an automated time clock at the beginning and end of his time spent working. On February 13, August 31, and November 10, 2006, petitioner received written warnings from respondent for failing to use the time clock properly. On December 6, 2006, respondent suspended petitioner for allegedly failing to use the time clock properly a fourth time. On December 11, 2006, human resources personnel informed petitioner that his employment was being terminated, and on December 19, 2006, they confirmed petitioner's termination in writing. Pet. App. 64-65.

On September 12, 2007, petitioner filed a written complaint with the Wisconsin Department of Workforce Development. Pet. App. 65. He contended that, between September and December 2006, he had repeatedly complained to human resources personnel at the Portage facility that the location of respondent's time clocks was unlawful. Petitioner claimed that, contrary to the requirements of the FLSA, the clocks' location resulted in employees not being compensated for all time spent donning and doffing required protective gear. See 29 U.S.C. 254(a); *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29-30 (2005). Petitioner alleged that on the same day that he was informed of his termination, December 11, 2006, respondent moved its time clocks closer to the employee entrance. Pet. Br. 11.

3. On December 5, 2007, petitioner filed two actions against respondent. First, he brought a collective action (into which 156 co-workers eventually opted), alleging that respondent had violated the FLSA and Wisconsin state law by failing to compensate employees for don-

ning and doffing time. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, No. 07-cv-449-bbc (W.D. Wisc.). Second, petitioner brought this action, alleging that he had been terminated for complaining about the unlawful location of respondent's time clocks. Pet. App. 65. Those actions were initially consolidated, but the parties later stipulated to their severance. *Id.* at 73 n.1.

a. The district court granted plaintiffs' motion for summary judgment in the collective action. Pet. App. 73-113. Respondent did not dispute, the court noted, that "[e]mployees were not paid for some required donning and doffing because time clocks were located past locker rooms and gowning areas." *Id.* at 85. After rejecting respondent's various defenses, *id.* at 91-95, the court concluded that "[respondent] violated the FLSA and Wisconsin labor law by not compensating plaintiffs for all hours worked," *id.* at 96. The parties later settled the case for $1.425 million. Pet. Br. 12 n.8.

b. The district court, however, granted respondent's motion for summary judgment in this action. Pet. App. 63-72. As the court noted, the FLSA protects an employee who has "filed any complaint" from retaliatory discharge, 29 U.S.C. 215(a)(3). Pet. App. 66. In the court's view, "[t]he language of the statute covers employees that 'file[] *any* complaint,'" which includes complaints to employers as well as to governmental authorities. *Id.* at 70 (brackets and emphasis in original). But the court held that the complaint, whether to an employer or to an agency, must be made in writing: "One cannot 'file' an oral complaint. * * * An oral complaint can become a filed complaint only if it is committed to document form." *Ibid.*

4. a. The court of appeals affirmed. Pet. App. 32-43. The court held that "the plain language of the statute

indicates that internal, intracompany complaints are protected," because "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" *Id.* at 37. The court further held, however, that "unwritten, purely verbal complaints are not protected activity," because "[t]he use of the verb 'to file' connotes the use of a writing." *Id.* at 39. The court declined to defer to the Secretary's view that oral complaints are protected activity, because "the Secretary's interpretation * * * appears to rest solely on a litigating position rather than on a * * * regulation, ruling, or administrative practice." *Id.* at 39 n.2.

b. Judge Rovner, joined by Judges Wood and Williams, dissented from the denial of rehearing en banc. Pet. App. 2-14. She reasoned that although "the term 'to file' often connotes (particularly for lawyers) the submission of a document, it is by no means out of the ordinary to read and hear the term used in conjunction with oral complaints; in that sense, 'to file' is used more broadly to signify the making of a report or the lodging of a protest." *Id.* at 6. Judge Rovner observed that "the notion that one can 'file' an oral complaint or grievance is reflected in any number of federal opinions and regulations." *Id.* at 6-7. She also observed that "Congress in many other statutes has specifically required written complaints." *Id.* at 7-8. Judge Rovner further noted that treating oral complaints as protected activity is consistent with "the Department of Labor's view for nearly fifty years," *id.* at 6, as well as this Court's decisions construing the FLSA broadly to cover acts that culminate in the filing of a complaint, *id.* at 11-13.

SUMMARY OF ARGUMENT

I. A. The FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3), prevents an employer from discharging or discriminating against an employee "because such employee has filed any complaint." The court of appeals correctly held, and respondent did not dispute at the certiorari stage, that Section 215(a)(3)'s protection for "any complaint" includes an employee's internal complaint to his employer. But if an employee may not be discharged for an internal written complaint, there is no reason to allow discharge for an internal oral complaint. Section 215(a)(3) categorically prevents retaliation against an employee who has filed "any complaint." Neither the text nor the remedial purposes of the FLSA support interpreting the phrase "any complaint" broadly to include internal as well as external grievances, but interpreting the term "filed" narrowly to exclude a particular form of internal grievance.

B. The term "filed" does not implicitly narrow Section 215(a)(3)'s comprehensive protection for "any complaint." Contrary to the decision below, the verb "file" does not invariably refer to the submission of a written document. In many contexts, the verb "file" refers to the speaker's oral transmission of information. That is the relevant meaning in the employment context, where the term "file" refers to the submission or communication of a grievance. For that reason, as a matter of both regulation and common practice, employees file oral complaints under the vast majority of federal employment-related statutes. Moreover, the decision below fails to recognize that elsewhere in the FLSA and other statutes, Congress has expressly stated when a complaint or document must be in writing.

C. When Congress enacted the FLSA in 1938, the phrase "file a complaint" had an established meaning in labor laws as the making of any complaint by an employee. Congress thus understood the phrase "file a complaint" as no different in the labor context from phrases like "make a complaint" or "report a violation," *i.e.*, types of actions that naturally encompass both oral and written submissions by employees.

D. This Court has repeatedly interpreted the FLSA consistent with Congress's remedial purposes. The decision below undermines those purposes in several ways. In particular, it discourages informal resolution of pay disputes, creates a trap for unwary employees who comply with company procedures, encourages prompt termination of employees who complain orally, deters employees from asserting their rights, and disproportionately harms workers with low incomes or limited English skills. There is no practical reason to distinguish between oral and written communications in the workplace, particularly since employers, the Department of Labor, and the EEOC routinely record employees' oral complaints in written form. The decision below also threatens to undermine other statutory schemes that rely on similar anti-retaliation provisions for their enforcement.

II. At the very least, Section 215(a)(3) does not unambiguously state that an employee must communicate his complaint in writing to be protected against retaliation. To the extent that Section 215(a)(3) is ambiguous, the Secretary of Labor and the EEOC are entitled to resolve that ambiguity; they are charged with administering Section 215(a)(3), and their consistent interpretation for nearly a half-century is reasonable.

ARGUMENT

I. THE FLSA'S PROHIBITION ON RETALIATING AGAINST AN EMPLOYEE WHO HAS "FILED ANY COMPLAINT" PROTECTS ORAL COMPLAINTS ABOUT SUSPECTED FLSA VIOLATIONS

The FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3), makes it unlawful for any person

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

As relevant here, Section 215(a)(3) prevents an employer from retaliating against an employee "because such employee has filed any complaint * * * under or related to" the FLSA. In this case, petitioner alleges that he had several conversations with his supervisors during which he complained that employees were not being compensated for time spent donning and doffing required protective gear. There is no question that petitioner's statements concerned potential violations of the FLSA. The sole question presented is whether, by making those statements, petitioner "filed any complaint" and thus is protected by the FLSA against retaliatory discharge.

A. The Text Of The FLSA Protects Employees From Retaliation For Filing "Any Complaint," Including Oral Grievances To An Employer

1. Before the court of appeals, respondent argued that petitioner could be discharged not only because his

complaints were oral rather than written, but also because they were made to respondent rather than a governmental agency. The court of appeals rejected the latter argument. It held that "the plain language of the statute indicates that internal, intracompany complaints are protected," because "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" Pet. App. 37. Respondent did not argue in its brief in opposition to the petition for certiorari that the judgment should be affirmed on the alternate ground that internal complaints are unprotected, and thus any argument to that effect has been waived. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004); *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

As the court of appeals recognized, the vast majority of its sister circuits likewise have held that Section 215(a)(3) protects an employee from retaliation for filing an internal complaint with his employer. See *Hagan* v. *Echostar Satellite, L.L.C.*, 529 F.3d 617, 625-626 (5th Cir. 2008); *Pacheco* v. *Whiting Farms, Inc.*, 365 F.3d 1199, 1202, 1206 (10th Cir. 2004); *Moore* v. *Freeman*, 355 F.3d 558, 562-563 (6th Cir. 2004); *Lambert* v. *Ackerley*, 180 F.3d 997, 1004-1005 (9th Cir. 1999) (en banc), cert. denied, 528 U.S. 1116 (2000); *Valerio* v. *Putnam Assocs., Inc.*, 173 F.3d 35, 41-44 (1st Cir. 1999); *EEOC* v. *White & Son Enters.*, 881 F.2d 1006, 1011-1012 (11th Cir. 1989); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); but see *Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), cert. denied, 511 U.S. 1052 (1994).

Indeed, until the decision below, no court of appeals had held that internal written complaints are covered, while internal oral complaints are not. The Fifth and

Ninth Circuits have concluded that an employee's internal oral complaints are protected activity under the FLSA. See *Hagan*, 529 F.3d at 626; *Ackerley*, 180 F.3d at 1004. The Sixth, Eighth, Tenth and Eleventh Circuits have treated an employee's internal oral complaints as protected activity, without drawing any distinction between whether the complaint was oral or written. See *Moore*, 355 F.3d at 562; *Brennan*, 513 F.2d at 181; *Pacheco*, 365 F.3d at 1202, 1206; *White & Son Enters.*, 881 F.2d at 1011. And although the Second Circuit has held that an employee's internal complaint to his employer is not protected activity, see *Genesee Hosp.*, 10 F.3d at 55, that court did not distinguish between whether the internal complaint was oral or written.[1]

2. Assuming that, as the court of appeals held, an employee may not be discharged for a *written* complaint to his employer, there is no reason to allow retaliatory discharge for an *oral* complaint. Section 215(a)(3) categorically prevents retaliation against an employee who has "filed *any* complaint" (emphasis added). See, *e.g.*,

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[1] The court of appeals incorrectly relied on *Ball* v. *Memphis Bar-B-Q Co.*, 228 F.3d 360 (4th Cir. 2000). Pet. App. 40. In *Ball*, an employee (Linton) was preparing to file an action under the FLSA. A fellow employee (Ball) then brought a separate action for retaliatory discharge, alleging that he had been terminated for telling their employer that he would testify in Linton's favor if asked to do so. The court held that Ball was not "about to testify in any * * * proceeding" within the meaning of Section 215(a)(3), because Linton had yet to institute a lawsuit against their employer. *Ball*, 228 F.3d at 364. The court did not address the meaning of other clauses in Section 215(a)(3), including the ban on retaliation for "fil[ing] any complaint." The Fourth Circuit has construed similar language in the Surface Transportation Assistance Act, 49 U.S.C. 31105(a)(1)(A)(i) (Supp. II 2008), to include "internal complaints to company management, whether written or oral." *Calhoun* v. *Department of Labor*, 576 F.3d 201, 212 (2009).

Republic of Iraq v. *Beaty*, 129 S. Ct. 2183, 2189 (2009) ("Of course the word 'any' * * * has an 'expansive meaning.'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). The plain text of Section 215(a)(3) thus affords protection for a complaint in "any" form. As explained in Point B, *infra*, the term "filed" does not implicitly narrow that comprehensive protection. Rather, the term "filed" simply refers to an actual submission or communication of a grievance. It would make little sense, particularly in light of the remedial purposes of the FLSA, to interpret the phrase "any complaint" broadly to include internal as well as external grievances, but to interpret the term "filed" narrowly to exclude a particular form of internal grievance. See, *e.g.*, *SEC* v. *Central-Illinois Sec. Corp.*, 338 U.S. 96, 124 (1949) ("Both sections are parts of the same statute, designed to give effect to the same legislative policies.").

B. The Term "Filed" Does Not Restrict The FLSA's Protection For "Any Complaint"

1. The court of appeals concluded that "unwritten, purely verbal complaints are not protected activity," because "[t]he use of the verb 'to file' connotes the use of a writing." Pet. App. 39. The term "filed" is often used in association with a written document, and its use thus may suggest the existence of such a document. But that is so because the nature of a proceeding or other circumstances make clear that a written document is necessary. For example, in federal court, "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. Such language reflects the obvious point that one common use of the term "file" is to refer to the submission of a written document to a court, governmental agency, or administrative body. Pet. App. 40;

see, *e.g.*, *The American Heritage Dictionary of the English Language* 658 (4th ed. 2006) (defining the verb "file" in part as "[t]o enter (a legal document) on public official record") (*American Heritage Dictionary*).

The court of appeals erred, however, in concluding that the term "file" can only refer to the submission of a written document. In many contexts, the term "file" means simply to submit or present information to another, including through speech. For instance, a newspaper reporter may "file" a story with his editor over the telephone. See *American Heritage Dictionary* 658 (defining the verb "file" in part as "[t]o send or submit (copy) to a newspaper"). An airplane pilot may "file" his flight plan with air traffic controllers over the radio. See 14 C.F.R. 1.1 (defining "flight plan" to include information "that is filed orally or in writing with air traffic control"). An insured may "file" a proof of loss or claim over the telephone. See *Parks* v. *Farmers Ins. Co.*, 227 P.3d 1127, 1131-1132 (Or. 2009) (en banc). Or an employee may "file" a complaint by speaking with her employer or an administrative body. See *Encarta World English Dictionary* (2009) (defining the verb "file" in part as "to submit something such as a claim or complaint to the appropriate authority so that it can be put on record"). In those contexts, the term "file" includes a speaker's oral transmission of information.

Consistent with that understanding, "the notion that one can 'file' an oral complaint or grievance is reflected in any number of federal * * * regulations." Pet. App. 6. Many federal regulations, including those promulgated by the Departments of Defense, Energy, and Health and Human Services, establish procedures that allow parties to "file" oral complaints or grievances.[2] Many other federal regulations provide that parties may orally "file" an application, motion, or appeal.[3] One federal regulation even employs both meanings of the term "filed"—*i.e.*, the submission of oral information to make a record and the submission of a written document for the same purpose. See 20 C.F.R. 416.325(b)(2) (considering an application for supplemental security income benefits "to be filed on the date of the filing of a written statement or the making of an oral inquiry under [certain] conditions"). Those regulations—drawn from a variety of different sectors of our government and economy—"put to rest the notion that filing a complaint invariably means filing a *written* complaint." Pet. App. 7 (emphasis in original).[4]

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[2] See, *e.g.*, 10 C.F.R. 501.161(a) (providing in requirements for "[f]iling a complaint" that the Office of Fossil Energy "will accept oral complaints"); 32 C.F.R. 842.20 (providing in requirements for "[f]iling a claim" that members of the Air Force may "complain[] (orally or in writing) to the commander of a military organization or unit of the alleged offending member"); 42 C.F.R. 422.564(d)(1) ("An enrollee may file a grievance with the [Medicare Advantage] organization either orally or in writing."); 423.564(d)(1) ("An enrollee may file a grievance with the [Medicare] Part D plan sponsor either orally or in writing."); 438.402(b)(3)(i) ("The enrollee [in a managed care organization] may file a grievance either orally or in writing."); 438.402(b)(3)(ii) ("The enrollee or the provider may file an appeal either orally or in writing, and unless he or she requests expedited resolution, must follow an oral filing with a written, signed, appeal."); 494.180(e) ("The [end-stage renal disease] facility's internal grievance process must be implemented so that the patient may file an oral or written grievance with the facility without reprisal or denial of services."); cf. 21 C.F.R. 211.198(a) (providing that in maintaining its "[c]omplaint files," the Food and Drug Administration will establish "[w]ritten procedures describing the handling of all written and oral complaints regarding a drug product").

[3] See 7 C.F.R. 42.108(f)(2) (providing that a party may "file an appeal" by making an oral request); 56.62 (same); 70.102 (same); 75.27 (same); 9 C.F.R. 590.320 (same); see also 5 C.F.R. 630.402 ("An employee must file an application—written, oral, or electronic, as required by the agency—for sick leave."); 20 C.F.R. 408.301 ("This subpart also explains when a written statement or an oral inquiry may be considered to establish your application filing date [for certain types of veterans' benefits]."); 49 C.F.R. 1503.629(c) ("Filing of motions. A motion made prior to the hearing must be in writing or orally on the record.").

2. Significantly, in the employment context, employees routinely "file" oral complaints, charges, or grievances under statutes administered by the Department of Labor and the EEOC. In fact, the EEOC has been explicit that employees may file oral complaints under both the Equal Pay Act—which is governed by the FLSA's anti-retaliation provision—and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See *EEOC Compliance Manual* § 2.4(a)(1)(ii) (2010) (stating that complaints under the EPA "need not be written and may be filed in person, by mail or by phone"); *id.* § 2.7; 29 C.F.R. 1626.7(b)(3) (providing that "the date of filing" for "[o]ral charges filed in person or by telephone" with the EEOC under the ADEA is the date on which the "oral communication [is] received by [the] Commission").[5]

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[4] Numerous state statutes also provide that parties may file an oral complaint or grievance. See, *e.g.*, Alaska Stat. § 47.32.090 (2008); Cal. Health & Safety Code § 17055(a) (West 2006); D.C. Code § 7-1231.12 (2008); Ind. Code Ann. § 27-8-28-14 (West 2008); Me. Rev. Stat. Ann. tit. 34-B, § 5604.3.A (2009); Miss. Code Ann. § 69-47-23(4) (West 2009); Nev. Rev. Stat. § 618.336 (2006); N.J. Stat. Ann. § 30:4C-12 (West 2008); N.Y. Ins. Law § 3217-a(a)(7) (McKinney 2006).

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, specifies that "[c]harges shall be in writing." 42 U.S.C. 2000e-5(b). Title VII, however, prohibits retaliation not only because an employee has filed a charge, but also "because he has opposed any practice made an unlawful employment practice." 42 U.S.C. 2000e-3(a). An employee

The Department of Labor administers a number of federal employment-related statutes besides the FLSA, including the Davis-Bacon Act (DBA), the Family and Medical Leave Act of 1993 (FMLA), the McNamara-O'Hara Service Contract Act (SCA), the Occupational Safety and Health Act of 1970 (OSHA), and the Walsh-Healey Act (WHA). The FLSA and those other statutes require covered employers to post notices that inform employees how to obtain additional information about their legal rights and obligations. See 29 C.F.R. 516.4 (FLSA); see also 29 C.F.R. 5.5(a)(1)(i) (DBA); 29 U.S.C. 2619 (FMLA); 29 C.F.R. 825.300(a) (same); 29 C.F.R. 4.183 and 4.184 (SCA and WHA); 29 U.S.C. 657(c)(1) and 29 C.F.R. 1903.2(a) (OSHA). Those notices contain toll-free numbers, such as 1-866-4-USA-DOL or 1-866-4-USWAGE, that employees may call in order to obtain such information.

Employees who call those toll-free numbers to complain about suspected violations of the FLSA will be given the contact information for one of the Wage and Hour Division's local offices, which employees can visit or call directly. According to the Department, when an employee complains to a local office—whether in person, by mail, or by telephone—the complaint is entered into the Wage and Hour Investigative Support and Reporting Database (WHISARD), and regional staff then determine the appropriate response. From the viewpoint of both the employee and the Department, there is no difference between an oral and a written complaint: either is recorded in the Department's database and reviewed for further action. Indeed, the Wage and Hour

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who orally complains to his employer or the EEOC thus has "opposed" the relevant practice and is protected against retaliation even if he has not yet filed a written charge. See, *e.g.*, *Genesee Hosp.*, 10 F.3d at 55.

Division receives a substantial number, if not the majority, of complaints by telephone, especially from low-income workers who are reluctant or unable to visit a local office or to complete written forms outlining their grievances. Wage and Hour Division policy prohibits requiring employees to complain in writing or in person.[6]

In addition, employers often encourage employees to complain internally, whether orally or in writing. For instance, respondent encourages its employees to report suspected legal violations to their supervisors or human resources personnel, and it has a designated telephone line so that employees may call and complain orally. Pet. Br. 5-7. Consistent with that practice, the term "filed" is used in construing private labor agreements to mean the submission of a complaint to an employer or regulatory authority. See *NLRB* v. *Southwestern Elec. Coop., Inc.*, 794 F.2d 276, 279 (7th Cir. 1986) (affirming the NLRB's finding that a collective bargaining agreement included "the right to file oral grievances"). The decision below thus is at odds with the ordinary meaning of the phrase "file[] any complaint" in the employment context, as well as with the common practice among employees of filing complaints orally with their employers or governmental authorities.[7]

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[6] Like the FLSA, OSHA has an anti-retaliation provision that protects an employee who has "filed any complaint." 29 U.S.C. 660(c)(1). The Department interprets that provision to protect "lodging complaints" with employers, 29 C.F.R. 1977.9(c), including oral complaints, see *OSHA Instruction, Directive No. DIS-0-0.9*, Section 7-1 (Aug. 22, 2003) ("Section 11(c) whistleblower complaints may be filed in any form (verbal, written, fax, etc.)."), http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf. Although the Department has interpreted the FLSA in similar fashion through administrative adjudication rather than regulation, its interpretation remains entitled to deference. See p. 31, *infra*.

3. The court of appeals reasoned that interpreting the term "filed" to include an employee's submission of an oral complaint would require "reading words out of [the] statute." Pet. App. 42-43. Precisely the opposite is true: the court's interpretation requires reading words *into* the FLSA. When Congress has intended to require that a complaint be filed in writing rather than orally, it has expressly so provided.[8] Indeed, in surrounding provisions of the FLSA itself, Congress has specified that parties must file certain types of written documents. See 29 U.S.C. 210(a) (requiring the "filing" in court of "a written petition"); 214(c)(2) (requiring "written assurances to the Secretary"); 214(c)(5)(A) (re-

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[7] As the courts of appeals have recognized, an employee's "abstract grumbling[]" or "amorphous expression[] of discontent" is not sufficient to invoke Section 215(a)(3). *Ackerley*, 180 F.3d at 1007; see *Valerio*, 173 F.3d at 44. Regardless of whether an employee's complaint is oral or written, the question is "whether the complaining employee has communicated the substance of his concerns to the employer." Pet. App. 9; see *EEOC* v. *Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992).

[8] See, *e.g.*, Federal Election Campaign Act of 1971, 2 U.S.C. 437g(a)(1) ("Any person who believes a violation of this Act * * * has occurred, may file a complaint * * * . Such complaint shall be in writing."); Veterans Employment Opportunities Act of 1998, 5 U.S.C. 3330a(a)(1)(A) and (2)(B); Packers and Stockyards Act, 7 U.S.C. 193(a); 7 U.S.C. 228b-2(a); Federal Seed Act, 7 U.S.C. 1599(a); 20 U.S.C. 7704(e)(1)(A); 28 U.S.C. 351(a); 36 U.S.C. 220527(a)(1); Uniformed Services Employment & Reemployment Act of 1994, 38 U.S.C 4322(a) and (b); Civil Rights Act of 1964, 42 U.S.C. 2000b(a); 42 U.S.C. 2000c-6(a); Fair Housing Act, 42 U.S.C. 3610(a)(1)(A)(i) and (ii); Americans with Disabilities Act of 1990, 42 U.S.C. 12217(a); Help America Vote Act of 2002, 42 U.S.C. 15512(a)(2)(C); Cable Communications Policy Act of 1984, 47 U.S.C. 554(g); Federal Aviation Act of 1958, 49 U.S.C. 46101(a)(1).

quiring "consent in writing" that "is filed with the Secretary"); 216(b) (requiring "consent in writing" that "is filed in the [appropriate] court"). The decision below effectively reads into Section 215(a)(3) the same requirement of a written document in order to trigger the statutory protection against retaliation. Congress knows how to specify when it wants such a requirement, and it did not do so in Section 215(a)(3).

Congress's practice of specifying when a complaint must be filed in writing is significant for other reasons as well. The express requirement of a written complaint in other federal statutes would be entirely superfluous if, as the court of appeals held, "the natural understanding of the phrase 'file any complaint' requires the submission of some writing." Pet. App. 40; see *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (recognizing as "one of the most basic interpretive canons" that statutes should be construed "so that no part will be inoperative or superfluous") (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004)). By contrast, the government has not identified any instance in which Congress has specified that a complaint may be filed orally. The clear implication is that, unless the text or context otherwise establishes that a written complaint is necessary, Congress contemplates that a complaint may be filed orally or in writing.

4. The court of appeals found its interpretation "confirmed by the fact that Congress could have, but did not, use broader language" in Section 215(a)(3). Pet. App. 42. Specifically, the court pointed to provisions in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA forbidding retaliation against an employee who "has opposed any practice" made unlawful under those statutes. 42 U.S.C. 2000e-3(a); 29 U.S.C.

623(d). According to the court, the "broader phrase, 'opposed any practice,' does not require" the filing of a written document, meaning that "Congress's selection of the narrower 'file any complaint' language in the FLSA thus appears to be significant." Pet. App. 42.

The court of appeals ignored the timing of the respective statutes' enactment. The FLSA was enacted in 1938, more than a quarter-century before Title VII and the ADEA in 1964 and 1967. The fact that Congress included "a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII [and the ADEA], tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA." *Ackerley*, 180 F.3d at 1005; cf. *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1945-1946 (2008) ("[N]egative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously.") (citations omitted). Congress's use of more detailed language in antidiscrimination statutes like Title VII and the ADEA does not indicate that Congress intended to narrow, *sub silentio*, the protections of the FLSA.[9]

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[9] In 1985, Congress amended the FLSA, see Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787-791, in response to this Court's holding in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that the Act applies to States and municipalities. The amendments delayed applicability of the FLSA's overtime provision, 29 U.S.C. 207, to state and local public employees until April 15, 1986, and provided that state and local governments could defer paying any such earned overtime wages until August 1, 1986. To provide public employees with protection against retaliation during the interim period, the amendments provided that "on or after February 19, 1985," States and municipalities could not discriminate against any public employee who "asserted coverage under [Section 207]"; however, to be protected from discrimination "after August 1, 1986," the em-

C. The Background Of The FLSA's Enactment Reinforces The Conclusion That "Filed Any Complaint" Broadly Means The Making Of Any Complaint

1. When Congress enacted the Fair Labor Standards Act in 1938, the phrase "file any complaint" had a recognized meaning in labor laws as the making of any complaint by an employee, whether written or oral. Section 215(a)(3) was preceded by the anti-retaliation provision in the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(4), which in turn had been modeled on Executive Order No. 6711 (1934) (Order). See *NLRB* v. *Scrivener*, 405 U.S. 117, 122-123 (1972). That Order was issued in 1934 under the National Industrial Recovery Act, and it provided that "[n]o employer * * * shall dismiss or demote any employee for making a complaint or giving evidence with respect to an alleged violation." The Order thus referred to "making a complaint" or "giving evidence," acts that naturally encompass both oral and written submissions.

At the time the Order was proposed, Attorney General Cummings explained its purpose:

> Obviously, the labor provisions in Codes cannot be adequately enforced unless employees report violations of these provisions to the proper authorities. They will not be likely to report such violations, how-

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ployee had to "take[] an action described in [Section 215(a)(3)]." The amendments protected employees who "asserted coverage" because until August 1, 1986, disputes centered on whether such employees were covered by the FLSA's substantive requirements. As of August 1, 1986, the employees were entitled to payment of past overtime wages and Section 215(a)(3) provided sufficient protection. The 1985 amendments are not relevant to the question presented here.

> ever, as long as the employer retains the right to dismiss because of having filed a complaint against him.

37 Op. Att'y Gen. 515, 516 (1934). Whereas the Order prohibited retaliating against an employee for "making a complaint" or "giving evidence," the Attorney General's opinion described that Order as preventing retaliation against an employee for "report[ing] violations" or "fil[ing] a complaint." The phrase "fil[ing] a complaint" thus was understood as synonymous with "making a complaint" or "report[ing a] violation."

2. When Congress enacted the NLRA a year later in 1935, it made it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." 29 U.S.C. 158(a)(4). Although Congress used the phrase "filed charges" rather than "making a complaint," that change was not substantive. The Senate committee report explained that Section 158(a)(4) was "merely a reiteration of the Executive order of May 15, 1934." Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.), 74th Cong., 1st Sess. (Comm. Print), *reprinted in* 1 *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949). Indeed, in debating Section 158(a)(4), Senators used the phrases "filed charges" and "make [a] complaint" interchangeably. See 79 Cong. Rec. 7676 (1935) (statements of Senators Wagner and Hastings).[10]

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[10] Shortly after the NLRA's passage, the National Labor Relations Board construed Section 158(a)(4) to prevent retaliation against an employee for orally reporting a violation to a fellow employee and later testifying about it. See *Viking Pump Co.*, 13 N.L.R.B. 576, 590 (1939), aff'd, 113 F.2d 759 (8th Cir. 1940), cert. denied, 312 U.S. 680 (1941). Although the employee's statements were not even to his employer, the Board found that they fell within the scope of Section 158(a)(4).

3. When Congress enacted the FLSA in 1938, it borrowed the language of the NLRA but strengthened its protections. Section 215(a)(3) protects an employee who "has filed any complaint" or "has testified" in a relevant proceeding, but it also protects an employee who "[has] instituted or caused to be instituted any proceeding," "is about to testify in any such proceeding," or "has served or is about to serve on an industry committee." On its face, Section 215(a)(3) expanded, rather than contracted, the ability of employees to report FLSA violations in multiple ways. Although Section 215(a)(3) uses the phrase "filed any complaint," that minor variation in wording was not significant. In hearings on the FLSA, its sponsor in the House of Representatives, William Connery, and witnesses, including Assistant Attorney General Robert Jackson and Secretary of Labor Frances Perkins, referred to those who "make complaints" under the Act. See *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Educ. and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. 100 (1937) (Connery); *id.* at 88 (Jackson); *id.* at 180 (Perkins). As those contemporaneous usages indicate, Congress understood the phrase "filed any complaint" in Section 215(a)(3) to mean simply the making of a complaint or reporting of a violation.

D. The Remedial Purposes Of The FLSA Warrant Protecting Oral Complaints To An Employer

1. This Court has repeatedly recognized that the FLSA is a broad statute designed to serve remedial purposes: namely, the elimination of substandard working conditions for employees in covered industries. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S.

728, 739 (1981); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 727 (1947). In order to effectuate those purposes, this Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)); see *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) ("[The FLSA] must not be interpreted or applied in a narrow, grudging manner.").

The Court took that interpretive approach in *Scrivener*, which concerned Section 158(a)(4) of the NLRA and its prohibition on retaliation "because [an employee] has filed charges or given testimony." In *Scrivener*, an employer had fired four of his employees for giving written statements as part of an investigation by the National Labor Relations Board. 405 U.S. at 118-120. Although this Court did not hold that the employees had "filed charges or given testimony" within the meaning of the NLRA, it held that they were protected for "participating in the investigative stage." *Id.* at 121. According to the Court, "Congress has made it clear that it wishes all persons with information about such [illegal] practices to be completely free from coercion against reporting them." *Ibid.* (quoting *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967)). The Court reasoned that "[i]t would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time." *Id.* at 124. The Court concluded that "[w]hich employees receive statutory protection should not turn on * * * events that have no relation to the need for protection." *Id.* at 123-124.

The Court should take the same approach to the interpretation of Section 215(a)(3), which uses language similar to that of the NLRA. See pp. 21-22, *supra*; see also *McComb*, 331 U.S. at 723-724 (noting that decisions interpreting the coverage of the NLRA have persuasive force as to the coverage of the FLSA). The FLSA's anti-retaliation provision is crucial to achieving the remedial purposes of the entire statutory scheme. To ensure compliance by employers with the wage and hour requirements of the FLSA, Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). In Congress's view, "effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Ibid.* In short, "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Ibid.*

2. Congress's objectives would go unrealized in several important respects if employees could face retaliation for oral complaints to their employers. As an initial matter, protecting employees' oral complaints promotes early and informal resolution of pay disputes, which in turn decreases costs to employers and their employees. See Pet. Br. 49. Many employers, including respondent, affirmatively encourage their employees to report suspected legal violations internally, without distinguishing between oral and written complaints. The court of appeals' interpretation thus creates—and encourages employers to create—a trap for unwary employees like petitioner, who comply with company procedures only

to find themselves facing retaliation for having complained orally rather than in writing. See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 904 (2007) (criticizing as "flawed" a statutory interpretation that "creat[es] legal distinctions that operate as traps for the unwary").[11]

At the least, leaving oral complaints unprotected would give "an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally." *Valerio*, 173 F.3d at 43. And more generally, it would deter employees from asserting their rights under the FLSA. See, *e.g.*, *DeMario Jewelry*, 361 U.S. at 292 ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); cf. *Crawford* v. *Metropolitan Gov't*, 129 S. Ct. 846, 852 (2009) ("If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) ("The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII.").

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[11] In dissenting from denial of rehearing en banc, Judge Rovner observed that the panel's decision "presumably would apply to an employee's external contacts with regulatory officials." Pet. App. 9-10. In that event, an employee could face retaliation for filing an oral complaint with the Department of Labor's Wage and Hour Division or the EEOC. Yet oral communications are a common way in which employees inquire about their statutory rights and register complaints with those agencies. See pp. 15-16, *supra*. Respondent suggests that contacting federal agencies might qualify as "institut[ing] or caus[ing] to be instituted any proceeding." 29 U.S.C. 215(a)(3); see Br. in Opp. 18. If that is because an oral complaint to the Department of Labor or the EEOC results in a written record by the agency that is processed for further action, then the same logic suggests that oral complaints to employers "institute[]" a "proceeding"—at least where, as here, the employer has procedures for processing oral complaints or records the complaint in writing and processes it for further action.

Nor is there any practical reason to distinguish between oral and written communications. An employee who completes a written form or sends an e-mail to a supervisor is in no different position than an employee who communicates the same substance by voicemail or during a face-to-face meeting. See Pet. App. 9; *id.* at 14 ("Oral inquiries, protests, and information * * * play no less an important role in the statutory scheme than do letters, e-mails, and sworn statements."). Any distinction between oral and written communications would be all the more artificial in light of the practice of employers, the Department, and the EEOC, which routinely record employees' oral complaints in some written form. See pp. 15-16, *supra*. After all, that is what respondent did here. See Pet. Br. 9-11 nn.4-7.

By discouraging employees from filing oral complaints, the rule adopted by the decision below would disproportionately impact workers with low incomes or with limited English skills, *i.e.*, those workers who already are most reticent to complete written forms outlining their grievances. Indeed, the Wage and Hour Division is dependent on oral complaints, typically by telephone, from that sector of the workforce to monitor compliance with the FLSA. Respondent has not pointed to any evidence suggesting that as part of an Act targeted at aiding some of the most vulnerable persons in the labor force, Congress intended to protect those laborers from retaliation only when they complain to their employers or regulatory officials in writing.

3. The reasoning of the court of appeals, if adopted by this Court, also would threaten to undermine a host of other statutory schemes. Many federal statutes contain anti-retaliation provisions that are similar or identical in relevant part to Section 215(a)(3).[12] For example, the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105(a)(1)(A)(i) (Supp. II 2008), prohibits retaliation against an "employee" who "has filed a complaint" that is "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." The courts of appeals to consider the question have held, in accordance with the view of the Department of Labor, that an employee's internal oral complaints are protected by the STAA. See *Calhoun* v. *Department of Labor*, 576 F.3d 201, 212 (4th Cir. 2009); *Clean Harbors Envt'l Servs. Inc.* v. *Herman*, 146 F.3d 12, 22 (1st Cir. 1998); see also *Jackson* v. *CPC Logistics*, No. 07-006, 2008 WL 4820117, at *2 (Dep't of Labor Adm. Rev. Bd. Oct. 31, 2008). Yet under the reasoning

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[12] See, *e.g.*, Federal Service Labor-Management Relations Act, 5 U.S.C. 7116(a)(4); National Transit Systems Security Act, 6 U.S.C. 1142(a)(3) (Supp. II 2008); Immigration and Nationality Act, 8 U.S.C. 1182(n)(2)(C)(v), 1324b(a)(5); Foreign Service Act of 1980, 22 U.S.C. 4115(a)(4); National Labor Relations Act, 29 U.S.C. 158(a)(4); Occupational Safety and Health Act, 29 U.S.C. 660(c)(1); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1855(a); Employee Polygraph Protection Act, 29 U.S.C. 2002(4)(A); Family and Medical Leave Act, 29 U.S.C. 2615(b)(1); Workforce Investment Act, 29 U.S.C. 2934(f); Mine Health and Safety Act, 30 U.S.C. 815(c)(1); Older Americans Act of 1965, 42 U.S.C. 3058g(j); Railway Labor Act, 49 U.S.C. 20109(a)(3) (Supp. II 2008); Surface Transportation Assistance Act, 49 U.S.C. 31105(a)(1)(A)(i) (Supp. II 2008).

of the decision below, employees could be discharged for reporting many types of violations that are of serious public concern under such statutes. See, *e.g.*, *Passaic Valley Sewerage Comm'rs* v. *Department of Labor*, 992 F.2d 474, 478 (3d Cir.) ("Employees should not be discouraged from the normal route of pursuing internal remedies [under the Clean Water Act] before going public with their good faith allegations."), cert. denied, 510 U.S. 964 (1993); *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974) ("[C]overage of the [Coal Mine Health and Safety] Act begins when the miner notifies his foreman and/or safety committeeman of possible safety violations."), cert. denied, 420 U.S. 938 (1975).

II. THE SECRETARY OF LABOR AND EEOC'S LONGSTANDING INTERPRETATION IS REASONABLE AND ENTITLED TO DEFERENCE

At the very least, Section 215(a)(3) does not unambiguously state that an employee must communicate his complaint in writing to be shielded from possible retaliation. To the extent that Section 215(a)(3) is ambiguous, the Secretary of Labor and the EEOC are entitled to resolve that ambiguity; they are charged with administering Section 215(a)(3), and their longstanding and consistent interpretation of the statute is reasonable. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

1. Respondent does not dispute that the Secretary of Labor and the EEOC are charged by Congress with administering Section 215(a)(3). See Resp. C.A. Br. 19-20. Specifically, the Secretary is responsible for administering the entirety of the FLSA, including its anti-

retaliation provision, see 29 U.S.C. 204(a) and (b), 216(b) and (c); and the EEOC is responsible for enforcing the Equal Pay Act, see 29 U.S.C. 206(d), which is codified as part of the FLSA and subject to the same anti-retaliation provision.

2. The interpretation of Section 215(a)(3) adopted by the Secretary and the EEOC is entitled to deference. Both the Secretary and the EEOC have extensive experience in administering federal employment-related statutes generally; questions concerning prevention of retaliation against employees for their oral complaints are critical to the administration of the FLSA and the EPA specifically; and the Secretary and the EEOC have carefully considered those questions over a long period of time. Those factors "all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the [a]gency interpretation here at issue." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002); cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). And the interpretation by the Secretary and the EEOC is entitled in any event to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because it reasonably interprets the statutory language, avoids severe practical difficulties, and represents the Secretary's and the EEOC's consistent position.

As explained above, the text of Section 215(a)(3) may reasonably be read to prohibit retaliation against an employee who orally complains to his employer or the appropriate enforcement agency. See pp. 11-14, *supra*; see also *Power City Elec., Inc.*, No. C-77-197, 1979 WL 23049, at *2 (E.D. Wash. Oct. 23, 1979) (holding that "the term 'filed' as used in [the anti-retaliation provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1)] means 'lodged' and is not limited to a written form of complaint"). Interpreting Section 215(a)(3) in that way accords with common practice in the workplace, avoids a hollow distinction between oral and written communications, and best serves the purposes of the FLSA by protecting employees from retaliation for asserting their statutory rights.

The court of appeals held, however, that the position of the Secretary is not entitled to deference because it "appears to rest solely on a litigation position." Pet. App. 39 n.2. To the contrary, both the Secretary and the EEOC have long interpreted Section 215(a)(3) to prevent retaliation for filing an oral complaint. As early as 1961, the Secretary brought an enforcement action under Section 215(a)(3) on behalf of an employee who had orally complained about violations of the FLSA. See *Goldberg* v. *Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, at 40,986 (D. Utah 1961); *ibid.* ("In the context of the [FLSA], the term ['filed'] should not be given a strict or limited meaning but should be construed reasonably to accomplish the purposes the Congress obviously had in mind."); see also *Maxey's Yamaha*, 513 F.2d at 180-181 (enforcement action brought by the Secretary against an employer that had discharged an employee for an oral complaint); cf. *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991) ("The Secretary's interpretation of OSH Act regulations in an administrative adjudication * * * *is* agency action, not a *post hoc* rationalization of it.").

Since that time, both the Secretary and the EEOC repeatedly have argued in the courts that oral complaints to one's employer are protected under Section 215(a)(3). See, *e.g.*, Br. for the Secretary of Labor as Amicus Curiae, *Lambert* v. *Ackerley*, Nos. 96-36017, 96-36266, and 96-36267 (9th Cir. Apr. 12, 1999); Br. for the EEOC as Amicus Curiae. *Lambert* v. *Ackerley*.

Nos. 96-36017, 96-36266, and 96-36267 (9th Cir. Apr. 22, 1999); Br. for the EEOC, *EEOC* v. *White & Son Enters.*, No. 88-7658 (11th Cir. Mar. 1, 1989). And the EEOC has set forth its position in the compliance manual issued to field offices. See 2 *EEOC Compliance Manual, Section 8: Retaliation* §§ 8-I(A), 8-II(B) & n.12 (May 20, 1998), http://www.eeoc.gov/policy/docs/retal.pdf; see also *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (explaining that EEOC compliance manuals "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)).

In light of that history, the court of appeals erred in speculating that "the Secretary's interpretation of 'filed any complaint' appears to rest solely on a litigating position." Pet. App. 39 n.2. Rather, the Secretary's interpretation originated in "administrative practice," *ibid.*—namely, enforcement actions instituted by the Secretary. And although the Secretary subsequently has articulated her interpretation in amicus briefs, that is a reason to grant deference, not to withhold it. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to Secretary's interpretation of FLSA advanced in amicus brief because "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"); see also *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007). Indeed, the fact that for a half-century the Secretary and the EEOC have interpreted Section 215(a)(3) to protect oral complaints counsels strongly in favor of deference to their longstanding position. *Walton*, 535 U.S. at 222, 225; *Skidmore*, 323 U.S. at 140.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 09-834

In The

Supreme Court of the United States

Kevin Kasten,
Petitioner,

v.

Saint-Gobain Performance
Plastics Corporation,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

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KEVIN KASTEN,
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SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,
Respondent.

On Writ of Certiorari to the
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For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 56 national and international labor organizations with a total membership of approximately 11.5 million working men and women.[1] This case presents an important question concerning the extent to which the Fair Labor Standards Act protects employees from retaliation for complaining to their employers about employment practices that violate the Act. The AFL-CIO has often filed briefs in cases concerning the enforcement of the FLSA, *see, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 n. † (2005), and in cases involving other statutes with anti-retaliation provisions that track the language of the FLSA, *see, e.g.*, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 3 n. * (1980) (concerning the Occupational Safety and Health Act's anti-retaliation provision).

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[1] The petitioner and the respondent have each filed a letter with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Petitioner Kevin Kasten alleges that he repeatedly verbally complained to supervisors and managers of his employer, Saint-Gobain Performance Plastics Corporation, that the company's placement of its time clocks required employees to spend unpaid time donning and doffing personal protective gear in violation of the Fair Labor Standards Act. Following these complaints, Saint-Gobain fired Kasten for the stated reason that he repeatedly failed to follow Saint-Gobain's time clock punching policy. Kasten admits that, prior to his discharge, he had not complained in writing about his employer's alleged violations of the FLSA.

After he was fired, Kasten brought both a claim for retaliation under FLSA § 15(a)(3), 29 U.S.C. §215(a)(3), and a claim, along with 156 other workers, for unpaid wages and overtime for time spent donning and doffing protective gear. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F.Supp. 2d 941 (W.D. Wisc. 2008). The district court granted Kasten and the other workers partial summary judgment on their unpaid wages and overtime claim. *Id.* at 962. In a separate opinion, the court granted summary judgment to Saint-Gobain on Kasten's individual retaliation claim on the ground that employees who make intracompany complaints are protected by

FLSA § 15(a)(3) but only if the complaint is made in writing rather than orally. Pet. App. 70-71.

The Seventh Circuit affirmed the district court's decision in Kasten's retaliation case. That court held at the threshold that "the plain language of the statute indicates that internal, intracompany complaints are protected," reasoning that "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" Pet. App. 37. But, the Seventh Circuit agreed with the district court that "unwritten, purely verbal complaints are not protected activity." *Id.* at 39. The court based this conclusion on what it "believe[d] to be the natural understanding of the verb 'to file' . . . the submission of some writing to an employer, court, or administrative body." *Id.* at 40.

SUMMARY OF ARGUMENT

The question presented by this case is whether an employee's oral complaint to his employer of a violation of the Fair Labor Standards Act is protected by § 15(a)(3), 29 U.S.C. § 215(a)(3), the anti-retaliation provision of that statute. The plain meaning of this provision is that such complaints are protected. Section 15(a)(3) protects employees from retaliation both for having "filed any complaint . . . under or related to th[e] Act" and for having "instituted or caused to be instituted any proceeding under or related to th[e] Act." Congress's use of the word "any" to modify "complaint" indicates that the statute protects all types of complaints, both internal complaints to the employer and complaints that institute proceedings before government bodies. By protecting both the "fil[ing] of any complaint" and "institut[ing] . . . any proceeding," the statute makes clear that the sort of complaints protected are not limited to formal complaints that would "institute[] . . . a[] proceeding." Within this overall context, the phrase "filed any complaint" is most naturally read as having "submitted" or "lodged" any complaint, both well-accepted synonyms for "filed." In normal usage, a complaint need not be in writing to be "submitted" or "lodged."

Protecting employees who verbally complain to their employers of FLSA violations also accords with workplace realities. The most commonly-accepted method for employees to register an employment-related complaint, including at Saint-Gobain, is to first raise it verbally with their immediate supervisor. In the unionized setting, multi-step grievance procedures typically provide for the presentation of verbal grievances. And as a matter of common sense, there is no reason to believe that Congress intended to protect employees who institute formal proceedings, but not employees who seek to raise and resolve FLSA complaints through face-to-face discussions with their employer.

The Department of Labor has consistently interpreted § 15(a)(3) to protect oral complaints. The Department's views are entitled to special weight in this case because for the first forty years of the FLSA's existence, the agency had exclusive authority to enforce § 15(a)(3). In addition, the Department of Labor has adopted an interpretive regulation constructing the identical terms of the Occupational Safety and Health Act's anti-retaliation provision as encompassing health and safety complaints that employees "lodge[] . . . with their employer." 29 C.F.R. § 1977.9(c). Given the identical statutory terms, if § 15(a)(3) is interpreted to leave oral complaints about FLSA violations unprotected, employees will be less likely to complain about imminently unsafe working conditions as well for fear of employer retaliation.

ARGUMENT

The question presented by this case is whether an employee who makes an oral complaint to his employer of Fair Labor Standards Act violations is protected against discharge or other discrimination for so doing by the FLSA's anti-retaliation provision. The plain language of the FLSA's anti-retaliation provision – read as a whole – does protect employees who make oral complaints of FLSA violations to their employers. The contrary conclusion reached by the court below rests on the erroneous approach of determining the meaning of the statutory term "file" standing alone and without regard to the statutory context in which that term is used.

1. Section 15(a)(3) of the Fair Labor Standards Act provides:

> "[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

Taken as a whole, then, § 15(a)(3) protects employees from retaliation for: i) having "filed any complaint . . . under or related to th[e] Act;" or ii) having "instituted or caused to be instituted any proceeding under or related to th[e] Act." As the court below recognized, it follows that "the plain language of the statute indicates that internal, intracompany complaints are protected." Pet. App. 37. In the first place, as the Seventh Circuit noted, "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" Pet. App. 37. What is more, by expressly protecting *both* "fil[ing] any complaint" *and* "institut[ing] or caus[ing] to be instituted any proceeding," the statute makes clear that the class of "complaint[s]" protected by

§ 15(a)(3) is in addition to and separate from the class of formal legal "complaint[s]" that serve to "institute[] . . . a[] proceeding."

In normal usage, the word "complaint" can mean either an "[e]xpression of dissatisfaction" or "[t]he presentation by the plaintiff in a civil action, setting forth the claim on which relief is sought." *Webster's II; New College Dictionary* 229 (1999). In the context provided by § 15(a)(3), the word "complaint" is used in the former sense to encompass the broad class of employee communications expressing dissatisfaction with employer practices that allegedly violate the FLSA, such as internal, intracompany complaints that do not rise to the level of formal legal complaints that "institute a proceeding."

2. Having correctly concluded that "internal, intracompany complaints are protected" by § 15(a)(3), the court below went on to wrongly conclude that "unwritten, purely verbal complaints are not protected activity." Pet. App. 39. This holding conflicts with the long-standing interpretation of the Department of Labor that both verbal and written complaints are protected by § 15(a)(3). *Id.* at 39-40 n. 2.

The Seventh Circuit based its conclusion that only the submission of written complaints is protected on what it "believe[d] to be the common understanding of the verb 'to file.'" Pet. App. 39. The court explained in this regard:

> "If an individual told a friend that she 'filed a complaint with her employer, we doubt the friend would understand her to possibly mean that she merely voiced displeasure to a supervisor. Rather, the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body." *Id.* at 39-40.

It may well be that the "natural understanding of the phrase" "filed a complaint" ***standing alone*** would be "the submission of some writing to an employer, court, or administrative body." Pet. App. 40. But that would be so only because, standing alone, the phrase "filed a complaint" suggests the dictionary definitions of "file" relied upon by the Seventh Circuit, *viz.*, "to place among official records as prescribed by law" or "to perform the first act of (as a lawsuit)." *Id.* at 39.

FLSA § 15(a)(3), however, protects both "fil[ing] *any* complaint" and "institut[ing] any proceeding." And that statutory context precludes the "common understanding" of the verb "file" relied upon by the Seventh Circuit. In the context provided by § 15(a)(3), the phrase "file any complaint" clearly does not use the word "complaint" in the restrictive sense to mean "[t]he presentation by the plaintiff in a civil action." *Webster's II; New College Dictionary* 229. That being so, it cannot be that that the phrase uses the word "file" in the restrictive sense of "place among official records as prescribed by law" or "perform the first act of (as a lawsuit)." For actions of that kind are separately protected as "institut[ing] or caus[ing] to be instituted any proceeding under or related to th[e] Act."

In § 15(a)(3), read as a whole, the office of the phrase "filed any complaint" is thus to protect employees who "submit" or "lodge" an "expression of dissatisfaction" regarding a violation of the FLSA's wage and hour requirements. The verbs, "file," "submit" and "lodge" are well-accepted synonyms for each other. *See The New American Roget's College Thesaurus* 142 (1958) ("submit, deliver"); *Webster's II; New College Dictionary* 644 ("lodge: . . . [t]o register (a charge) in court or with an appropriate party: FILE"). It is, therefore, common to say that someone "files or lodges" something with the appropriate party and to treat the two words as having the same meaning. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). On this meaning of the verb "file," an employee "file[s] a[] complaint" about an FLSA violation by "submitting" or "lodging" the complaint with the employer either verbally or in writing. *See, e.g., EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 587 (9th Cir. 2000) (plaintiffs "registered several oral complaints" with employer); *Masiello v. Metro-North Commuter Railroad*, 748 F. Supp. 199, 208 (S.D.N.Y. 1990) (plaintiff "lodge[d] oral complaints of physical abuse" with employer).

3. Congress's decision to protect employees who "file[] any complaint," including those who verbally complain to their employers of FLSA violations, in addition to employees who "institute[] or cause[] to be instituted any proceeding" seeking redress of the statutory violation, is consistent with the predominant means of handling workplace disputes involving legal claims and reflects the common sense of those dispute resolution systems.

(a) The most common method for employees to make an employment-related complaint is to first raise it verbally with their immediate supervisor. That is the means provided by Saint-Gobain's own internal complaint procedure. Pet. Br. 4-5, quoting Docket Nr. 91, Exh. 12, p. 3. Even among union-represented employees, who would have the assistance of a trained shop steward in preparing written complaints, it is common for the first step in the multi-step collectively bargained grievance procedure to provide for the presentation of verbal grievances. *See* Chamberlain & Kuhn, *Collective Bargaining* 149-53 (2d ed. 1965).

In many collective bargaining agreements, "the informal, oral presentation of a complaint to the immediate supervisor constitutes the first official step in the grievance procedure." McPherson, *Resolving Grievances: A*

Practical Approach 38 (1983). Even where that is not the case, there is almost always an "informal stage [that] precedes the first official step." *Ibid.* In either case, "the informal step usually involves the immediate supervisor or the manager at the lowest level with authority to settle the complaint and the employee, with or without a steward." *Ibid.* The practical utility of informally conferring over an employee's complaint before instituting formal proceedings is obvious:

> "The chief functions of the initial stage of the grievance procedure are confrontation and fact finding; a dispute is joined when the employee or steward and the supervisor come face to face to identify, to discuss, and hopefully to resolve a problem. Prior to the confrontation, the parties may not even realize that problem exists, much less appreciate its dimensions." *Ibid.*

Against that background, there is every reason to believe that Congress intended to protect not only employees who "institute[] or cause[] to be instituted [formal] proceeding[s] under or related to th[e] Act" but also employees who give their employers the opportunity "to identify, to discuss and hopefully to resolve [the] problem" by engaging in "face to face" discussion prior to initiating formal legal proceedings. As District Judge Christenson observed in sustaining the Department of Labor's conclusion that § 15(a)(3) protects oral complaints:

> "It would be most unreasonable that an employee, not subject to discharge because he filed a paper or letter with a wage and hours officer, could be dismissed with impunity should he have the courtesy to first write a letter to or to confer with his employer concerning his complaint and if the employer could so summarily discharge his [employee] as to preclude formal filing."

> *Goldberg v. Zenger*, 43 Labor Cases (CCH) ¶ 31, 155, 1961 U.S. Dist. LEXIS 3693, p. *3 (D. Utah, Aug. 2, 1961).

And, as we have emphasized above, the fact that the statute protects *both* "fil[ing] any complaint" *and* "institut[ing] . . . any proceeding" strongly indicates that Congress did not intend any such unreasonable result.

(b) There is, moreover, an important practical reason for the 1938 Congress's decision to protect both verbal and written complaints. As explained by the National War Labor Board – which supervised collectively bargaining in the United States during the period immediately following the enactment of the FLSA – in many workplaces of that period the presentation of written grievances would be difficult for the typical employee:

> "In many plants where there is a high degree of illiteracy, the writing of grievances by employees works a substantial hardship. In other plants where there is considerable dirt and special clothes must be worn, it is often not practicable to write up grievances during work hours." *The Termination Report of the National War Labor Board: Industrial Disputes and Wage Stabilization in Wartime, January 12, 1942 – December 31, 1945*, vol. 1, p. 122 (1947-49).

The proponents of the Fair Labor Standards Act understood that the statute "only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked." H. Rep. No. 1452, 75th Cong., 1st Sess. 9 (Aug. 6, 1937). And, in supporting the enactment of the FLSA, the President emphasized that it is precisely in those "communities in the United States where the average family income is pitifully low . . . that we find the poorest educational facilities." Address of the President of the United States, H.

Doc. No. 458, 75th Cong., 3d Sess. 4 (Jan. 3, 1938). Thus, the FLSA was intended to protect the very workers whose "high degree of illiteracy" would make "the writing of grievances . . . a substantial hardship" and who worked in conditions in which "it is often not practicable to write up grievances during work hours." *Termination Report of the National War Labor Board*, vol. 1, p. 122. That background makes it particularly unlikely "that the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing." Pet. App. 43.

4. Consistent with the statutory language and the practical realities of the workplace, the Department of Labor has, from the beginning, always interpreted FLSA § 15(a)(3) to protect oral complaints.[2]

The Department of Labor's views in this regard are entitled to special weight, because for the first forty years of the FLSA's existence, the Department had exclusive authority to enforce § 15(a)(3). *Compare* Fair Labor Standards Act of 1938, Pub. L. No. 75-718 § 16, 52 Stat. 1060, 1069, *with* Fair Labor Standards Amendments of 1977, Pub. L. 95-151 § 10, 91 Stat. 1245, 1252. Thus, the Department's successful prosecution of § 15(a)(3) retaliation claims involving verbal complaints represents "a contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion" and, as such, is entitled to "peculiar weight." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (The Department of Labor's position "reflect[s] the agency's fair and considered judgment on the matter in question" and "is in no sense a 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack."). The fact that an interpretation of a statute "is consistent with the [agency]'s longstanding practice is persuasive evidence that it is the correct one." *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457, Slip Op. at 8 (June 17, 2010).

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[2] *See, e.g.*, *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975) (suit on behalf of worker fired after orally complaining to employer about scheme of requiring employees to kick-back wage awards), *Goldberg v Bama Mfg. Corp.*, 302 F.2d 152, 154 (5th Cir. 1962) (suit on behalf of worker fired two days after making oral complaint to state labor agency); *Goldberg v. Zenger*, 43 Labor Cases (CCH) ¶ 31,155, 1961 U S. Dist. LEXIS 3693 (D. Utah, Aug. 2, 1961) (suit on behalf of worker fired after orally complaining to employer that he should be paid owed wages in a lump sum rather than by installment).

The Department's consistent interpretation of "filed any complaint" in FLSA § 15(a)(3) is reinforced by its interpretative regulation giving the same construction to the identical phrase in the anti-retaliation provision of the Occupational Safety and Health Act (OSHA). OSHA § 11(c)(1) provides:

> "No person shall discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. § 660(c)(1).

The Department's interpretative regulation states that the phrase "filed any complaint" encompasses "lodging complaints about occupational safety and health matters with their employer." 29 CFR § 1977.9(c).

The Department's interpretation of the phrase "filed any complaint" in OSHA indicates both the consistency of the agency's interpretation of this statutory phrase as well as the full breadth of what is at stake in this case. As District Judge Neill observed in holding that "the term 'filed' as used in [OSHA § 11(c)(1)] means 'lodged' and is not limited to a written form of complaint":

> "The right to make oral complaints to an employer is necessarily implicit within these sections of the chapter because safety rights could not possibly be exercised nor safety achieved without communication between employee and employer concerning workplace hazards." *Marshall v. Power City Electric, Inc.*, 1979 O.S.H.D. (CCH) ¶ 23,947, 1979 WL 23049, p. *2 (E.D. Wash. 1979).

Just as protection for oral complaints is essential to preventing occupational injury or death, the effective enforcement of the FLSA can only be achieved if employees can orally complain about their wages and hours to their employer without the "fear of economic retaliation" that might otherwise "operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

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AMICUS CURIAE BRIEF

No. 09-834

IN THE

Supreme Court of the United States

KEVIN KASTEN,
Petitioner,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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August 2010

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IN THE

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KEVIN KASTEN,

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council, National Association of Manufacturers and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*. The brief supports the position of Respondent before this Court in favor of affirmance.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is

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other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are all employers subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal and state employment statutes and regulations. As potential defendants to individual and collective actions brought under the FLSA and the EPA, *amici's* members have a direct and ongoing interest in the issue before this Court regarding the scope of Section 215(a)(3), the FLSA's anti-retaliation clause. The court below correctly held that verbal complaints made to a company supervisor regarding alleged FLSA violations do not constitute protected activity under Section 215(a)(3).

Because of their interest in the application of the nation's fair employment laws, EEAC, NAM and/or NFIB Small Business Legal Center have filed *amicus curiae* briefs in a number of cases before this Court and the courts of appeals involving the breadth and scope of various federal anti-retaliation laws.[2] Given their significant experience, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

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[2] *See, e.g., Crawford v. Metro. Gov't*, 129 S. Ct. 846 (2009) (discussing scope of Title VII's anti-retaliation provision); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (construing anti-

STATEMENT OF THE CASE

Petitioner was employed by Respondent Saint-Gobain Performance Plastics Corporation, a manufacturer of high-performance polymer products, in its Portage, Wisconsin facility from October 2003 to December 2006. Pet. App. 81. Pursuant to Respondent's time and attendance policies, Petitioner was required to record his time by swiping in and out of a time clock located at the facility. *Id.* at 84-85. He received four progressively serious disciplinary notices over an eight month period for failing to do so, and was issued a final warning on November 10, 2006. Petitioner eventually was discharged on December 11, 2006. *Id.* at 34-35.

Petitioner claims that from October through his termination in December, he verbally complained to supervisors about the location of the facility's time clock. *Id.* at 34. He contended that the location of the time clock "prevented employees from being paid for time spent donning and doffing their required protective gear" in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* *Id.* It is undisputed that Petitioner never submitted any written complaint to Respondent regarding potential

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retaliation protections under Section 1981); ***Burlington N. & Santa Fe Ry. v. White***, 548 U.S. 53 (2006) (interpreting adverse action); ***Thompson v. North American Stainless, LP***, 567 F.3d 804 (6th Cir. 2009) (*en banc*) (third party retaliation protection under Title VII), *cert. granted*, 79 U.S.L.W. 3007 (U.S. June 29, 2010).

FLSA violations associated with the location of the time clocks.

In December 2007, Petitioner filed an action in the U.S. District Court for the Western District of Wisconsin alleging that he was discharged in retaliation for his verbal complaints, in violation of Section 215(a)(3) of the FLSA. *Id.* at 35. Respondent moved for summary judgment, arguing that Petitioner's verbal complaints were insufficient, as a matter of law, to constitute protected activity under Section 215(a)(3). *Id.*

The district court agreed, concluding that an informal complaint of FLSA violations is protected under the statute only if it is reduced to writing and is "filed" with the employer. It observed:

> [Plaintiff] [t]elling his supervisors that he believed that the locations of defendant's time clocks were illegal or even that he was thinking about starting a lawsuit regarding time clock location would not fulfill the requirement of filing a complaint under the FLSA's anti-retaliation provision. At most, plaintiff's oral complaining was "abstract grumbling," or an "amorphous expression of discontent" regarding the location of defendant's time clocks.

Pet. App. 71 (citations omitted). On appeal, the Seventh Circuit affirmed. Regarding the question whether an internal company complaint can ever constitute "protected activity" under the FLSA, it responded in the affirmative, noting that the plain language of the FLSA's anti-retaliation provision makes it unlawful for an employer "to discharge . . . any employee because such employee has *filed any* complaint . . . ." Pet. App. 38 (first emphasis added).

As to what form such a complaint should take, the Seventh Circuit concluded that in order to constitute protected activity under Section 215(a)(3), an employee's complaint must be in writing, noting that the common meaning of the phrase "file any complaint" as it is used in Section 215(a)(3) strongly supports such an interpretation. *Id.* at 39-40. Furthermore, it observed, the FLSA's anti-retaliation provision is not as broad as others, such as that found in Title VII of the Civil Rights Act of 1964 (Title VII), which provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a). Therefore, it concluded that the scope of Section 215(a)(3) protected activity is narrower, and simply does not extend to purely verbal complaints. *Id.* at 42. Petitioner filed a petition for a writ of certiorari, which this Court granted on March 22, 2010.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, prescribes certain minimum wage and overtime pay requirements for workers employed by covered businesses. Like the majority of other federal workplace protection laws, the FLSA contains an anti-retaliation provision, which makes it unlawful for any person to:

> [D]ischarge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (citations omitted). Section 215(a)(3) enumerates only three types of conduct that constitute legally protected activity under the FLSA: (1) filing a complaint; (2) instituting or testifying in an FLSA proceeding; and (3) serving on an industry committee. *Id.* In that regard, Section 215(a)(3) is much narrower in scope than many other federal civil rights statutes, such as Title VII of the Civil Rights Act of 1964, which prohibits retaliation against an individual "because he has opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act. 42 U.S.C. § 2000e-3(a).

Because Section 215(a)(3) prohibits retaliation based on the *filing* of a complaint – not, as is the case under Title VII, based on an individual's mere "opposition" to discriminatory employment practices – the Seventh Circuit below was correct in concluding that verbal protestations to a company supervisor regarding alleged FLSA violations that are never reduced to writing do not constitute protected activity under the Act.

Interpreting Section 215(a)(3) to protect from retaliation those who file written complaints with their employers, but not those who lodge purely verbal grievances, adheres to the actual text of the statute while also supporting Section 215(a)(3)'s policy objectives. An employee who seeks to complain about a perceived FLSA violation remains free to do so, but that individual will not be able to claim the benefit of Section 215(a)(3)'s anti-retaliation protection unless he or she actually reduces the grievance to a writing that sufficiently describes the claim – whether by handwritten letter, email, or other form of more formal written communication. Because Section 215(a)(3) already provides sufficient protection for employees who engage in certain activities in protest of perceived FLSA violations, there is no sound basis for further expanding it in the manner urged by Petitioner.

Extending Section 215(a)(3) to encompass purely verbal complaints, however informal, would undermine the ability of employers to effectively manage their workforces and enforce legitimate workplace rules. But requiring employees to make written complaints of potential FLSA violations not only would facilitate swift resolution of the dispute, but also would discourage employees from making false or frivolous complaints that stem more from idle "grumblings" than from legitimate workplace concerns.

Expanding Section 215(a)(3) in such a manner also likely would have the practical effect of creating a cause of action for an entire class of anonymous objectors who, for example, might report a suspected violation using a workplace grievance "hotline" without ever having to identify him or herself. At least two members of the Court seemed to question the wisdom of such an interpretation, even under Title VII's considerably broader "opposition" clause language. *See Crawford v. Metro. Gov't*, 129 S. Ct. 846, 855 (2009) (Alito, J. [joined by Thomas, J.], concurring) ("The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear; and I do not understand the Court's holding to reach that issue here").

ARGUMENT

I. UNLIKE OTHER FEDERAL STATUTES, SECTION 215(a)(3) ESTABLISHES ONLY THREE TYPES OF CONDUCT THAT CONSTITUTE LEGALLY PROTECTED ACTIVITY, NONE OF WHICH INCLUDES THE AIRING OF PURELY VERBAL GRIEVANCES

Section 15 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215 (Section 215), makes it unlawful for employers to retaliate against an employee because that employee has "filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). Section 215 "does not prohibit employers from taking adverse employment action, that is, retaliating, against employees generally. Rather, section 215(a)(3) protects from retaliation only those employees who engage in three expressly enumerated types of conduct." *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., dissenting).

In contrast, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et. seq.*, as amended, which prohibits discrimination on the basis of race, color, religion, sex or national origin, contains a considerably broader anti-retaliation provision that makes it unlawful for an employer to discriminate against an employee or applicant for employment "because he has opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act. 42 U.S.C. § 2000e-3(a).[3] Thus unlike Section 215(a)(3), Title VII protects from retaliation those who "oppose" discriminatory employment practices, as well as those who file discrimination charges or otherwise "participate" in Title VII investigations, proceedings, or hearings.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004)). As the Seventh Circuit below observed, because Congress could have elected to, but did not, incorporate into the FLSA Title VII's broader "opposed" or "participated" language, the former necessarily must be construed more narrowly than other anti-retaliation provisions such as Title VII. Indeed, "the cause of action for retaliation under the FLSA is much more circumscribed." *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

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[3] Both the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, which prohibits discrimination against individuals with disabilities and whose remedial scheme is patterned after Title VII, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, which prohibits discrimination because of age, contain similar anti-retaliation provisions. 42 U.S.C. § 12203(a); 29 U.S.C. § 623(d).

Petitioner dramatically declares that the decision below "largely eviscerates the statute's protection for workers who bring violations [under the FLSA or the EPA] to their employers' attention," Pet. Brief at 50, an argument that seems to lose sight of the Seventh Circuit's actual holding, which simply declines to extend Section 215(a)(3)'s protections to include purely verbal, rather than written, employee complaints. As this Court long has observed, Section 215(a)(3) is designed to enable employees to freely report suspected violations to their employers without the fear of economic reprisal. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292-93 (1960). That purpose is in no way frustrated, however, by placing reasonable limitations, consistent with the plain text of the statute, on the type and quality of "complaint" deemed sufficient to constitute protected activity under Section 215(a)(3).

Construing the phrase "file any complaint" to include formal, internal employee complaints that are committed to writing, but not purely verbal protestations that are never actually memorialized, supports the Act's broad remedial purposes while at the same time adhering to the narrower construction called for by the text of Section 215(a)(3) itself. As the court below pointed out, "[e]xpansive interpretation is one thing; reading words out of a statute is quite another." Pet. App. 42-43.

Petitioner points to this Court's recent decisions in *Gomez-Perez v. Potter*, 553 U.S. 474, 128 S. Ct. 1931 (2008), and *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), as further justification for an expansive interpretation of Section 215(a)(3). But those cases involve different facts and, more importantly, address concerns about victims of alleged workplace retaliation who, unlike Petitioner, appear to have had *no* legal protections under the particular laws in question; in both cases, the Court was faced with civil rights statutes that did not contain any express anti-retaliation provision at all.

At issue in *Gomez-Perez* were the provisions of the ADEA applicable to federal sector employees. While the private sector nondiscrimination provisions contain an express anti-retaliation clause, Congress saw fit not to include similar language in the federal sector provisions. The plaintiff alleged that she was subjected to retaliation by her employer, the U.S. Postal Service, after she filed a complaint of age discrimination. Both the district court and the appeals court dismissed the retaliation claim, concluding that the differences between the federal sector and private sector provisions compel the conclusion that Congress did not intend to provide federal employees with a private right of action for retaliation under the ADEA.

This Court reversed. Writing for the majority, Justice Alito acknowledged that the federal sector ADEA provisions at issue do not expressly contain a retaliation clause, but also pointed out that those provisions were patterned directly after a similar federal sector provision of Title VII, which contains a "broad prohibition of 'discrimination,'" and thus should be treated similarly. *Gomez-Perez*, 128 S. Ct. at 1940.

In *CBOCS West*, the question before the Court was whether Section 1981 of the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981, which also does not contain an express anti-retaliation provision, impliedly allows for such a claim by one person who has complained about the violation of another's "contract-related right." In extending anti-retaliation protection to Section 1981 plaintiffs, the Court concluded that to the extent that it previously has recognized a retaliation cause of action under statutes very similar to Section 1981, *stare decisis* requires that it treat Section 1981 in a consistent manner.

Unlike the statutes at issue in *Gomez-Perez* and *CBOCS West*, Section 215 actually *does* contain an express anti-retaliation provision, the scope of which is plain on its face. As the Seventh Circuit below pointed out, Congress's choice of the term "to file" in Section 215 "connotes the use of a writing" and thus necessarily excludes from coverage purely verbal complaints to a company supervisor. Pet. App. 39.

By way of comparison, Title VII's anti-retaliation provision protects workers not only who "file" charges – which, by definition, must be "in writing" and submitted "under oath or affirmation," 42 U.S.C. § 2000e-5(b) – but also who "oppose" discriminatory employment practices. 42 U.S.C. § 2000e-3(a). In the Title VII context, "when an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." *Crawford v. Metro. Gov't.*, 129 S. Ct. 846, 851 (2009) (quotations and citations omitted).

In addition to prescribing certain minimum wage and overtime pay requirements, the FLSA, like Title VII, also expressly prohibits sex-based compensation discrimination. Specifically, the Equal Pay Act of 1963, 29 U.S.C. § 206(d), prevents employers from paying men and women located in the same location and performing the same or substantially the same job a different wage. The EPA preceded Title VII, which also proscribes sex-based pay discrimination, but is much broader in scope and available remedies.

Thus, contrary to Petitioner's assertions, EPA plaintiffs are not likely to be left "unprotected" under the Seventh Circuit's interpretation of Section 215, because they will continue to have Title VII at their disposal. Furthermore, under the Seventh Circuit's interpretation below, EPA plaintiffs who complain *in writing* of suspected discriminatory wage disparities will remain fully protected from retaliation under Section 215.

II. EXTENDING SECTION 215(a)(3) BROADLY TO ENCOMPASS PURELY VERBAL COMPLAINTS, HOWEVER INFORMAL, WOULD UNDERMINE THE ABILITY OF EMPLOYERS TO EFFECTIVELY MANAGE THEIR WORKFORCES AND ENFORCE LEGITIMATE WORKPLACE RULES

Protecting those who do not come forward and take advantage of the means available to them to formally complain about suspected unlawful conduct undermines employers' ongoing efforts to expeditiously and successfully resolve workplace issues, efforts which obviously benefit both the employer as well as the employee. This is especially true in the case of a potential wage and hour violation, where failure to promptly make an affected worker whole only compounds the employer's ultimate liability for actual damages, as well as increases greatly the potential that it will be found to have willfully violated the law, thus exposing it to other serious penalties.[4] Responsible employers are not looking for the opportunity to retaliate against their employees. But even in situations in which there may be the threat or opportunity for retaliation, the potential for substantial liability under Section 215 provides a strong incentive to avoid any such opportunity.

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[4] Liability for violations of Section 215(a)(3) is more expansive than for other violations of the FLSA. Section 216 provides that "[a]ny employer who violates the provisions of [Section 215(a)(3)

An employee who is willing to reduce to writing his accusations of FLSA violations deserves to be fully protected from unlawful reprisal as a result of that protected activity. Such an interpretation is consistent with Section 215(a)(3)'s "file" a complaint language and comports well with the mechanisms developed by many employers to encourage swift resolution of disputes through internal channels. It also dissuades the making of false or frivolous complaints by workers more interested in idle "grumblings" than in resolving a legitimate concern over a perceived violation.

Many companies permit workers to anonymously report workplace issues through telephone "hotlines." *See, e.g., Whiting v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 23552 (E.D. Mich. Mar. 15, 2010); *Moorhouse v. Billington*, 2006 U.S. Dist. LEXIS 90922 (D.D.C. Dec. 15, 2006); *Stevens v. Deluxe Fin. Servs., Inc.*, 199 F. Supp. 2d 1128, 1139 (D. Kan. 2002). When an employee voices a specific concern or potential policy violation through the hotline, that information typically is referred to a human resources official for appropriate action. *See Stevens*, 199 F. Supp. 2d at 1139 n.30 ("When a hotline call contains allegations

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of this title] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section [215(a)(3) of this title], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

of discrimination, the transcription is routed to human resources in Minnesota, which refers the information to the local HR person").

These hotlines operate to enable the employer to quickly address potential policy violations that if left uninvestigated could lead to legal liability or other unfortunate consequences, even if a specific victim or complainant is not identified. An employee might use a hotline, for instance, to report a suspected leave violation that he or she believes occurred, but may not personally have experienced or observed. *See Moorhouse*, 2006 U.S. Dist. LEXIS 90922, at *5 (anonymous hotline complaint urging defendant to "'investigate Gayle Moorhouse's [sic]-HR Time-she is absent and does not use leave-unusual (or not) for someone in payroll?'"). Congress could not have intended to extend FLSA anti-retaliation protection to every anonymous hotline complainer who, though admittedly performing an important service on behalf of the company, has not even gone so far as to personally identify him or herself, much less lodge a formal complaint. *See Whiting*, 2010 U.S. Dist. LEXIS 23552, at *9 (plaintiff "called anonymously and refused to give specific details that would reveal his identity because he did not want anyone to know that he had made the complaint").

Extending Section 215(a)(3)'s anti-retaliation protections in the manner suggested by Petitioner could very well have the practical effect of creating a cause of action for an entire class of such anonymous objectors, the wisdom of which at least two members of the Court seemed to question even under Title VII's considerably broader "opposition" clause language. *See Crawford*, 129 S. Ct. at 855 (Alito, J. [joined by Thomas, J.], concurring) ("The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear; and I do not understand the Court's holding to reach that issue here").

Oral complaints are much more susceptible to misinterpretation and error and thus may be more difficult to investigate and resolve. Yet under the approach endorsed by Petitioner, even the thinnest suggestion of a potential violation – here, the propinquity of Respondent's time clocks – could be used as both a shield from legitimate disciplinary action as well as a sword against the employer. Indeed, an employer might very well hesitate to act against a poor performer or a discipline problem for fear of being accused of retaliation based on the *possibility* that the problem employee *may* have aired a wage-related grievance to some member of management at any point in the recent past. The practical problems associated with such a broad interpretation are particularly troubling to large companies with multiple layers of supervision where numerous opportunities exist for workers to make random, verbal complaints that later could be claimed to constitute "protected activity" under Section 215(a)(3).

Extending the scope of Section 215's protections to include verbal complaints also would place a substantial and unfair burden on employers by requiring them to act on every charge, however frivolous, to ensure that no action is taken that might be construed (or later conveniently claimed) by the complainant as constituting unlawful retaliation. Given the significant increase in both FLSA and retaliation litigation, such an employer would be placed at great risk – not necessarily of liability in every instance, but of having to expend precious time and substantial financial resources simply to defend itself before an administrative agency or in court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 09-0834

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN KASTEN,
Petitioner,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Bowen v. Georgetown Univ. Hosp.,
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Brennan v. Maxey's Yamaha, Inc.,
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Brock v. Casey Truck Sales, Inc.,
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Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 5, 6

CBOCS West, Inc. v. Humphries,
553 U.S. 442 (2008) 7

Cellitto v. SEMFED Mgmt.,
No. 06-1794, 2007 U.S. Dist. LEXIS 42517 (D. Md. June 12, 2007) 20

Chao v. Russell P. Le Frois Builder, Inc.,
291 F.3d 219 (2d Cir. 2002) 26

Clackamas Gastroenterology Assocs., P.C. v. Wells,
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Clean Harbors Envtl. Servs., Inc. v. Herman,
146 F.3d 12 (1st Cir. 1998) 18

Crawford v. Metro. Gov't of Nashville,
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Daniel v. Winn-Dixie Atlanta, Inc.,
611 F. Supp. 57 (N.D. Ga. 1985) 19

EEOC v. Romeo Cmty. Schs.,
976 F.2d 985 (6th Cir. 1992) 23

EEOC v. White & Son Enters.,
881 F.2d 1006 (11th Cir. 1989) 23

Fontana v. Caldera,
160 F. Supp. 2d 122 (D.D.C. 2001) 26

Garcia v. V. Suarez & Co.,
288 F. Supp. 2d 148 (D.P.R. 2003) 20

Goldberg v. Zenger,
43 Lab. Cas. (CCH) (D. Utah 1961) 22, 23

Gomez-Perez v. Potter,
553 U.S. 474 (2008) 7

Hagan v. Echostar Satellite, LLC,
529 F.3d 617 (5th Cir. 2008) 20

Hardwick v. Complete Skycap Serv.,
No. CV 04-0088-PHX-NVW, 2005
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Holden v. Hardy,
169 U.S. 366 (1898) 4

Jackson v. Birmingham Bd. of Ed.,
544 U.S. 167 (2005) 6, 7

Jafari v. Old Dominion Transit Mgmt. Co.,
No. 08-CV-629, 2008 U.S. Dist.
LEXIS 97037 (E.D. Va. Nov. 26,
2008) 20

Minor v. Bostwick Labs.,
654 F. Supp. 2d 433 (E.D. Va. 2009) 20

Mitchell v. Robert DeMario Jewelry, Inc.,
361 U.S. 288 (1960) 4, 16, 25

N. Haven Bd. of Ed. v. Bell,
456 U.S. 512 (1982) 22

Nat'l Wildlife Fed'n v. Browner,
127 F.3d 1126 (D.C. Cir. 1997) 26

Nicolaou v. Horizon Media, Inc.,
402 F.3d 325 (2d Cir. 2005) 19

NLRB v. Scrivener,
405 U.S. 117 (1972) 7

Old Ben Coal Co. v. Dir., Office of Workers Comp. Progs.,
292 F.3d 533 (7th Cir. 2002) 26

Reed v. A.W. Lawrence & Co.,
95 F.3d 1170 (2d Cir. 1996) 19, 20

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 5, 6

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) .... *passim*

Smiley v. Citibank (S.D.), N.A.,
517 U.S. 735 (1996) 25

Sullivan v. Mass. Mut. Life Ins. Co.,
802 F. Supp. 716 (D. Conn. 1992) 18

United States ex. rel. Yesudian v. Howard Univ.,
153 F.3d 731 (D.C. Cir. 1998) 18

United States v. Mead Corp.,
533 U.S. 218 (2001) 22

Valerio v. Putnam Assocs. Inc.,
173 F.3d 35 (1st Cir. 1999) 18, 19, 20

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29 U.S.C. § 215(a)(3) .... *passim*

BRIEFS

Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner, *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007) 13, 14

Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569) 13

Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009) (No. 08-2820) 24

Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part, *Kilpatrick v. Serv. Merch., Inc.*, No. 98-31423 (5th Cir. 1999).............................. 24

Brief for the Secretary of Labor as Amicus Curiae Supporting the Petitioner for Rehearing with Suggestion for Rehearing En Banc, *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (Nos. 96-36017, 96-36266, and 96-36267) 24

Informal Brief for the Secretary of Labor and the EEOC as Amici Curiae in Support of Plaintiff-Appellant, *Jafari v. Old Dominion Transit Mgmt. Co.*, No. 09-1004 (4th Cir. 2009) 24

OTHER AUTHORITIES

Allbusiness.com, "Tips for Dealing with Workplace Conflict," http://www.allbusiness.com/human-resources/workforce-management-conflict-resolution/12260-1.html (last visited June 10, 2010) 11

David Lewin, *Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis* J. Conflict Resol. 465, 465-66 (1987) 17

David Lewin, *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 172 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999) 12

David Lewin, *Resolving Conflict*, prepared for inclusion in *Handbook of Industrial and Employment Relations* 450 (Nick Bacon, et al., eds., 2007) 15, 17

David Lewin & Richard B. Peterson, *The Modern Grievance Procedure in the United States* 11-12 (1988) 10

Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005) 6, 16, 17

Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 Emp. Rts. & Emp. Pol'y J. 549, 553-54 (2001) 18

Harry E. Graham & Brian P. Heshizer, *The Effect of Contract Language on Low-Level Settlement of Grievances*, Lab. L.J. 30, July 1979 14

James W. Kuhn, *Bargaining in Grievance Settlement: The Power of Industrial Work Groups* 27 (1961) 14

Jennifer L. Redmond, *Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision*, 42 Wm. & Mary L. Rev. 319, 337-38 (2000) 10

John T. Delaney et al., U.S. Department of Labor, *Human Resource Policies and Practices in American Firms* 23, 59 (1989) 10

Peter M. Panken and Stacey B. Babson, "Creating the Personnel Paper Trail: Personnel Manuals and Grievance Procedures," SB36 ALI-ABA 1, 27-8 (1997) 11

Ralph H. Hasson & Karl A. Slaikeu, *Controlling the Costs of Conflict: How to Design a System for Your Organization* 14-15 (Jossy-Bass 1998) 15

Reducing the Risk of Litigation, Providence Bus. News, Oct. 18, 1999 11

S. Comm. on the Judiciary, The Corporate Criminal Fraud Accountability Act of 2002, S. Rep. 107-146 (2002) 7

Shirley Feldman-Summers, *Analyzing Anti-Harassment Policies and Complaint Procedures: Do They Encourage Victims To Come Forward?*, 16 Lab. Law. 307, 314 (2000) 12

Society for Human Resource Management, "Employee Grievance Procedure," http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS_000519.aspx (last visited June 7, 2010) 11

Stefan Rützel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 Temp. Envtl. L. & Tech. J. 1 (1995) 19

U.S. Chamber of Commerce, "Informal Complaint Procedures," http://www.uschambersmallbusinessnation.com/toolkits/guide/P05_7274 (last visited June 7, 2010) 11

INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee strongly supports Petitioner's position that employees who file verbal complaints should be protected from retaliation. Such protection is indispensable to the efficient, effective enforcement of the FLSA and worker protection laws generally.

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers.

The Asian American Justice Center ("AAJC") works to advance human and civil rights for Asian Americans, and build and promote a fair and equitable society for all. Founded in 1991, AAJC is one of the nation's leading experts on issues of importance to the Asian-American community.

The Asian Pacific American Legal Center ("APALC"), founded in 1983, is the nation's largest non-profit civil rights organization dedicated to advancing and protecting the Asian Pacific American community through impact litigation, direct legal services, policy advocacy, and community education.

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[1] Counsels of record for all parties have filed blanket letters of consent to the filing of *amicus curiae* briefs with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Equal Justice Society ("EJS") is a national organization of scholars, advocates, and citizens that seeks to promote equality and enduring social change through law, public policy, public education, and research.

The National Partnership for Women & Families (the National Partnership) is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life.

SUMMARY OF ARGUMENT

This case presents a straightforward question: does section 215(a)(3) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), protect an employee from being retaliated against for filing an oral complaint? The answer is "yes." Congress intended the anti-retaliation provision in section 215(a)(3) to be read broadly so that it would protect employees and foster cooperation, communication, and collegiality in the workplace.

Both employers and employees have a vested interest in resolving problems informally and avoiding litigation. Indeed, over the past thirty years internal grievance policies and procedures have become commonplace, and usually strongly encourage employees to make oral reports of potential employer violations. Many employers mandate that, before employees resort to written complaints and legal proceedings, they first try to resolve grievances orally. The Seventh Circuit's decision in this case would undercut these policies and procedures and create perverse incentives for employers and employees to act in ways contrary to both the purpose behind the anti-retaliation provision of the FLSA and the fair and efficient resolution of employment disputes.

Furthermore, the Court should accord deference to the consistent, well-reasoned, and longstanding views of both the Department of Labor and the EEOC in protecting oral complaints under section 215(a)(3). The positions of both the Department of Labor and the EEOC are not mere *post hoc* litigating positions, but instead have existed in compliance manuals, briefs, and cases for the past fifty years.

For these reasons this Court should reverse the Seventh Circuit.

ARGUMENT

I. THE COURT HAS CONSISTENTLY INTERPRETED ANTI-RETALIATION PROVISIONS BROADLY, CONSISTENT WITH THE STATUTORY INTENT.

If an employee is not protected when making an oral challenge to a violation of the FLSA, the substantive protections offered by the FLSA ring hollow. The Court has recognized that "[b]y the proscription of retaliatory acts set forth in [the FLSA], . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . [I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.* (*citing Holden v. Hardy*, 169 U.S. 366, 397 (1898)).

Consistent with this precedent, the Court has construed other statutory anti-retaliation provisions broadly to comport with congressional intent. The Court has recognized that the victims of unlawful employment policies and practices cannot be protected unless worker protection statutes are interpreted to provide robust protection from retaliation.

In the Title VII context, the Court has recognized this vital principle and stressed that the statute's anti-retaliation provision should be interpreted to ensure "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (interpreting the statutory term "employees" to permit former employees to sue for post-employment retaliation). "It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (*citing Robinson*, 519 U.S. at 346). If worker protection statutes are to deter and remedy unlawful conduct, individuals must have unrestricted "access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346.

Recently, the Court recognized that Title VII prohibits retaliation against an employee who answers questions during an employer's internal investigation. *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009). The Court acknowledged:

> If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

Id. at 852 (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)).

Similarly, in *Burlington Northern*, the Court held that an employee can recover damages if the employer's retaliatory actions "could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 57. The Court's holding includes actions that are not related to employment or do not occur at the workplace. *Id.* at 63-64. The Court made this ruling because it recognized that "a limited construction would fail to fully achieve the antiretaliation provision's 'primary purpose.'" *Id.* at 64 (quoting *Robinson*, 519 U.S. at 346).

In a recent case interpreting the Civil Rights Act, the Court concluded that Title IX's bar against discrimination necessarily also prohibits retaliation, despite the fact that the statutory language does not include a specific anti-retaliation provision. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005). The Court recognized that the objectives of Title IX could not be achieved without "effective protection against retaliation." *Id.* at 180.

> If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result.
>
> Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. . . . Without protection from retaliation,

> individuals who witness discrimination would likely not report it, . . . claims would be short-circuited, and the underlying discrimination would go unremedied.

Id. at 180-81 (internal quotations and citations omitted). The Court reaffirmed the need for strong protection against retaliation in *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) and *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

Likewise, in a case arising under the National Labor Relations Act ("NLRA"), the Court recognized:

> Congress has made it clear that it wishes all persons with information about [prohibited practices] to be completely free from coercion against reporting them . . . . This complete freedom is necessary . . . to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.

NLRB v. Scrivener, 405 U.S. 117, 121-122 (1972).

Congress has recognized that robust protection from retaliation is necessary because employers continually adapt their behavior to retaliate within the confines of the law. *See, e.g.*, S. Comm. on the Judiciary, The Corporate Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, at 19 (2002) (explaining that the whistleblower protections ultimately enacted in § 806 of the Sarbanes-Oxley Act of 2002 were necessary because "unfortunately, . . . most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law").

The FLSA's anti-retaliation provision should be interpreted broadly, in a manner that complies with the statute's expansive goals. Prohibiting and punishing retaliation protects individuals by fostering early discovery and elimination of unlawful policies and practices. Retaliation is always pernicious, but it is particularly so where retaliation effectively prevents complaints. If employers can suppress complaints by terminating or punishing employees who complain, employers will have a reduced incentive to avoid unlawful practices. This is particularly true where, as here, the victims of unlawful employment practices are employees who are in inferior bargaining positions vis-à-vis their employers. Congress surely did not intend to create a federal right (and a cause of action to enforce that right) yet allow individuals to suffer retaliation for asserting that very right. In keeping with the FLSA's statutory intent and the Court's jurisprudence in interpreting the FLSA and other worker protection statutes, verbal complaints of violations of the FLSA should be protected from retaliation.

II. THE RULE SUGGESTED BY THE RESPONDENT AND THE SEVENTH CIRCUIT IS HARMFUL TO BOTH EMPLOYERS AND EMPLOYEES AND DOES NOT COMPORT WITH THE REALITIES OF THE WORKPLACE.

A. The Seventh Circuit's Holding is Contrary to the Grievance Systems Currently in Place in Most Workplaces and Contrary to Workers' Expectations of Those Systems.

In holding that only written employee complaints merit coverage under section 215(a)(3) of the FLSA, the Seventh Circuit has created a rule that is incompatible with the policies and procedures set in place by a majority of companies in the United States. Those policies and procedures often encourage or require employees to initiate the complaint process with an oral complaint. The rule enunciated by the Seventh Circuit would render such policies practically unworkable because employees would have no redress against retaliation.

Moreover, it is reasonable for employees to assume that if they follow their employers' policies and make oral complaints, they will not be fired for doing so. But the decision below makes that assumption no longer reasonable, and those policies will fall into disuse, to the detriment of the public interest in promoting the efficient handling of workplace issues.

Companies in the U.S. have a long history of using grievance policies to efficiently handle workplace issues. U.S. companies began instituting internal employee grievance policies for union workers prior to World War II, and in the past thirty years they have become mainstream. *See* David Lewin & Richard B. Peterson, *The Modern Grievance Procedure in the United States* 11-12 (1988). By 1989, more than 50% of large employers had created some type of grievance process for non-union employees. John T. Delaney et al., U.S. Dep't of Labor, *Human Resource Policies and Practices in American Firms* 23, 59 (1993). A survey of one hundred human resource executives in the United States determined that by 1998, 57% of their companies had employee grievance policies. Assurex Int'l, Univ. of Miami & Am. Mediation Inst., EPL Survey Report (1998).

Most employers, including Mr. Kasten's, have adopted grievance policies that *require* employees to make oral complaints as the first step. Specifically, company procedures often dictate that complaints first be made at the bottom of the chain of command, informally, to one's direct supervisor. Jennifer L. Redmond, *Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision*, 42 Wm. & Mary L. Rev. 319, 337-38 (2000) (also noting that formal requirements "may discourage victims from coming forward because they are: (a) intimidating; (b) punishment, rather than solution, oriented; and (c) likely to result in publicity (and thus retaliation) for the victim"). An individual employee's informal, oral complaint to his immediate supervisor "is the actual first step of virtually all grievance procedures." Lewin & Peterson, *supra*, at 4.

Furthermore, the Chamber of Commerce, the Society for Human Resource Management, the American Law Institute, and the American Bar Association all suggest in their model policy guides that businesses maintain informal grievance procedures, and specifically advise having oral complaints as the first step in the grievance process. U.S. Chamber of Commerce, "Informal Complaint Procedures," http://www.uschambersmallbusinessnation.com/toolkits/guide/P05_7274 (last visited June 7, 2010); Society for Human Resource Management, "Employee Grievance Procedure," http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS_000519.aspx (last visited June 7, 2010); Peter M. Panken & Stacey B. Babson, "Creating the Personnel Paper Trail: Personnel Manuals and Grievance Procedures," SB36 ALI-ABA 1, 27-8 (1997) ("Step One of any grievance procedure should be informal and probably ought to be directly between the employee and his/her immediate supervisor. However, if the immediate supervisor is the problem, the employee should be permitted to start orally at the next level."). The support of these prominent organizations indicates the prevalence of oral grievance procedures among U.S. companies.

Business publications also advocate that employers use an informal oral grievance process before moving to more formal written procedures.[2]

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[2] *See, e.g.*, *Reducing the Risk of Litigation*, Providence Bus. News, Oct. 18, 1999, *available at* https://www.pbn.com/detail/2149.html?sub_id=2149&print=1; Allbusiness.com, "Tips for Dealing with Workplace Conflict," http://www.allbusiness.com/human-resources/workforce-management-conflict-resolution/12260-1.html (last visited June 10, 2010).

But, if the Seventh Circuit's interpretation is adopted, these oral grievance procedures will likely fall into obscurity because aggrieved employees will fear retaliation for voicing concerns about violations of federal law.

B. Both Employees and Employers Have a Vested Interest in Resolving Potential FLSA Violations Informally, Rather than Resorting to Formal Legal Proceedings.

The Seventh Circuit's holding, which allows employers to retaliate against employees who make verbal complaints about potential violations of the FLSA, serves neither the interests of employees nor employers. Rather, both employees and employers have a vested interest in resolving issues informally before resorting to formal legal proceedings.

Protecting employees from retaliation benefits employees by ensuring they feel secure when reporting suspected violations to their employer. Forcing employees to begin the grievance process with a written complaint can make for a more "reactive" and deteriorated employment environment. David Lewin, *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 172 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999). Thus, oral complaints help mend the employment relationship and avoid further issues, whereas written complaints tend to damage it even more. *Id.* Therefore, the proposition that "formal complaint procedures may discourage victims from coming forward" is not surprising. Shirley Feldman-Summers, *Analyzing Anti-Harassment Policies and Complaint Procedures: Do*

They Encourage Victims To Come Forward?, 16 Lab. Law. 307, 314 (2000).

Employers also have a vested interest in protecting their workers from retaliation by their supervisors. In the Title VII context, the business community has consistently stressed to the Court the importance of meaningful internal investigations to fulfilling Title VII's preventive purpose, and has urged the Court to adopt legal rules that encourage cooperation by employees. Employers argue that they must rely on employees to report unlawful behavior because "[e]ven the most conscientious employer cannot know or control every day-to-day action of every employee and must know of the harassing behavior before it can take action to halt it." Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 26, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569). This concern is no less applicable in the FLSA context, as employers often must rely on employee complaints to learn of potential FLSA violations.

Moreover, employers have recognized that affording protection to victims and cooperating witnesses is essential to encouraging their participation, and they have warned of the negative consequences that will ensue if witnesses and victims are not protected. The business community has acknowledged that "it often is difficult to persuade employees to come forward with reports of suspected wrongdoing or to participate in investigations of workplace misconduct." Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 16, *BCI Coca-*

Cola Bottling Co. of L.A. v. EEOC, No. 06-341 (U.S. Feb. 20, 2007). "If already reluctant employees knew that by reporting alleged wrongdoing they would potentially be exposing themselves to an investigation into their own motives, they would be even less likely to step forward." *Id.*

Modern-day informal grievance procedures, which usually begin with an oral complaint, work efficiently to reduce workplace conflict. Informal conversations in particular are the most efficient way of resolving such complaints. Lewin & Peterson, *supra*, at 53 (noting that "grievances [are] resolved more readily at the oral stage than the written stages" (*citing* Harry E. Graham & Brian P. Heshizer, *The Effect of Contract Language on Low-Level Settlement of Grievances*, Lab. L.J. 30, July 1979, at 427-32)). This is especially true in certain workplaces such as farms or mines, where a verbal complaint serves as a more practical option. A study by Professor James Kuhn found that "the line foremen and shop representatives . . . [of twenty different plants in nine industries] reported that they dispose informally of 80-90 per cent of all grievances." James W. Kuhn, *Bargaining in Grievance Settlement: The Power of Industrial Work Groups* 27 (1961).

Similarly, a study conducted between 1980 and 1983 by Professors Lewin and Peterson in *The Modern Grievance Procedure in the United States* demonstrates the effectiveness of oral complaints. Their extensive research revealed that significant numbers of workplace issues are resolved through informal means. At a steel manufacturer, 61% of all "pay and work" issues were solved at the first step (which is the informal oral complaint to the supervisor), 64% of "benefits" issues were resolved at this step, 39% of the complaints about working conditions were resolved at this step, and 64% of "discrimination" issues were resolved at this step. At a nonprofit hospital, 47% of "pay and work" issues, 62% of "benefits" issues, 49% of "working conditions" issues, and 64% of "discrimination" issues were resolved at the first step. Lewin & Peterson, *supra*, at 169, 181. In a later study, Professor Lewin found that the ratio of oral to written grievances was 10-to-1 in unionized workplaces and approximately 12-to-1 in non-union workplaces. David Lewin, *Resolving Conflict*, prepared for inclusion in *Handbook of Industrial and Employment Relations* 450 (Nick Bacon, et al., eds., 2007).

In addition to the benefit of efficiently resolving workplace issues, various companies also report that conflict management systems have helped significantly reduce litigation costs. *See* Ralph H. Hasson & Karl A. Slaikeu, *Controlling the Costs of Conflict: How to Design a System for Your Organization* 14-15 (Jossy-Bass 1998). For example, Motorola reported a 75% reduction in outside litigation costs over six years, and NCR reported a 50% reduction in costs as well as a reduction in the number of pending lawsuits from 263 to 28 over a nine year period. *Id.* Not surprisingly, employers have recognized the many benefits of having effective grievance procedures. *See* Lewin, *Resolving Conflict*, *supra*, at 449-50 ("Executives and managers of non-union businesses primarily view the grievance procedure as a mechanism for identifying workplace and organizational issues and as an information system for diagnosing, addressing, and resolving such issues." (internal citations omitted)).

Because both employees and employers have a vested interest in encouraging informal resolutions of potential violations of the law, both written and verbal complaints should be shielded from retaliation in order to encourage internal resolution.

C. The Seventh Circuit's Reading of the FLSA Cannot be Reconciled with the Statutory Intent and Will Discourage Compliance with the Law.

As the Court has recognized, Congress intended employees to be the primary enforcers of the FLSA. *Robert DeMario Jewelry*, 361 U.S. at 292 (noting that "Congress did not seek to secure compliance with prescribed [FLSA] standards through continuing detailed federal supervision," but instead, "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied"). The Seventh Circuit's holding in this case runs counter to this central purpose.

Multiple studies have shown that employees' fears of retaliation for reporting violations of labor laws are widespread, and the threat of retaliation strongly inhibits employees from raising valid objections. Professor Deborah Brake has noted that "retaliation is powerful medicine, functioning to suppress discrimination claims and preserve social order." Brake, *supra*, at 20. "Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Id.* In one study, 27% of respondents said fear of reprisal was their main reason for not filing grievance appeals under their company's grievance procedure. David Lewin, *Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis*, 31 J. Conflict Resol. 465, 465-66 (1987). If employers are permitted to fire employees for making oral complaints, employees' well-founded fear of reprisal will cause them to suffer violations of the law in silence.

The Seventh Circuit's holding—that the anti-retaliation protections of the FLSA are only available to employees who make their complaints in writing—would also place a substantial burden on all grievance systems. As was stated earlier, it has been estimated that the ratio of oral to written complaints is approximately 10-to-1 and 12-to-1, for union and non-union workplaces, respectively. *See* Lewin, *Resolving Conflict*, *supra*, at 450. Forcing all of these grievances to be submitted formally in writing would place a significant burden on employers' grievance systems and, ultimately, the court system.

Furthermore, the Seventh Circuit's holding—if adopted by the Court—would create perverse incentives for both employers and employees. If employees can be terminated for following their company's grievance procedures—which often require making oral complaints—they will forego these procedures in favor of formal proceedings, including lawsuits.

As noted in *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 43 (1st Cir. 1999), the failure to protect employees will cause them to file suit rather than attempt to informally settle disputes. *Id.* ("By protecting only those employees who kept secret their belief that they were being illegally treated until they filed a legal proceeding, the Act would discourage prior discussion of the matter between employee and employer . . . ."); *see also Sullivan v. Mass. Mut. Life Ins. Co.*, 802 F. Supp. 716, 725 (D. Conn. 1992) (noting that not protecting whistleblowers "would give employees with complaints an incentive to bypass management and go directly to the authorities"). This perverse incentive to avoid internal grievance procedures could both overwhelm the court system and harm employers. *See United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 742 (D.C. Cir. 1998) ("Nor would it be in the interest of law-abiding employers for the statute to force employees to report their concerns outside the corporation in order to gain whistleblower protection"); *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (finding that protecting internal complaints "is fairer and less wasteful of resources for both the corporate community and the government"); *Sullivan*, 802 F. Supp. at 725 ("Employers benefit from a system in which the employee reports suspected violations to the employer first."); Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 Emp. Rts. & Emp. Pol'y J. 549, 553-54 (2001) (when employees avoid internal grievance mechanisms, "it robs the employees, employer, and society of the benefits extended by such preventative tools"); Stefan Rützel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 Temp. Envtl. L. & Tech. J. 1 (1995) ("In short, internal whistleblowing and subsequent remediation may reduce mismanagement, and avoid lawsuits and legal regulation." (internal footnotes omitted)). By encouraging employees to avoid these internal grievance procedures, the Seventh Circuit's holding will ultimately harm both employees and employers.

The Seventh Circuit's holding also has the harmful effect of encouraging employers to fire employees immediately after they have raised an oral complaint, before they can submit the complaint in writing. This perverse incentive has been recognized by various courts. *See Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1985) (noting that if an employee's consultations with the Department of Labor were not protected, an employer could fire the employee before a written complaint was made); *cf. Valerio*, 173 F.3d at 43 (noting that not protecting internal complaints would create "an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally").[3]

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[3] Such perverse incentives are visible in the Second and Fourth Circuits, which have held that internal complaints as a whole are not protected activity. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (employee complained to CFO about pay discrepancies and was terminated); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170 (2d Cir. 1996) (employee complained to the vice president of the company about sexually offensive comments made by a co-

Contrary to Respondent's assertions, "abstract grumblings" would not constitute protected activity under the FLSA. As courts have noted, "not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer." *Valerio*, 173 F.3d at 44. Instead, courts have required employees to make a clear assertion of rights under the FLSA; merely disagreeing with a management decision is insufficient. *See, e.g.*, *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 627-28 (5th Cir. 2008) (employee did not file any complaint where "he did not frame *any* of his objections in terms of the potential illegality" of management actions). This requirement has served as an effective barrier to questionable claims under section 215(a)(3). *See, e.g.*, *Hardwick v. Complete Skycap Serv.*, No. CV 04-0088-PHX-NVW, 2005 U.S. Dist. LEXIS 46341, at

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worker and was fired as a result); *Minor v. Bostwick Labs.*, 654 F. Supp. 2d 433 (E.D. Va. 2009) (employee verbally complained to COO about employer deleting overtime hours in violation of FLSA and was terminated); *Jafari v. Old Dominion Transit Mgmt. Co.*, No. 08-CV-629, 2008 U.S. Dist. LEXIS 97037 (E.D. Va. Nov. 26, 2008) (employee complained in a letter to employee benefits plan administrator about underpay; later employee filed internal "official complaint" and was terminated); *Bell-Holcombe v. Ki, LLC*, 582 F. Supp. 2d 761 (E.D. Va. 2008) (employee registered verbal and written complaints with management about disparate pay and was terminated); *Cellitto v. SEMFED Mgmt.*, No. 06-1794, 2007 U.S. Dist. LEXIS 42517 (D. Md. June 12, 2007) (employee complained to supervisor and wrote a letter to owner of company about underpay and was terminated as a result); *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148 (D.P.R. 2003) (after reporting sexual harassment to management, employee was dismissed). Some employers, if allowed, would not hesitate to terminate employees who raise concerns regarding the legality of employment practices.

*12 (D. Ariz. June 16, 2005) (plaintiff who "complained 'about money matters' to supervisors" did not file a complaint). In summary, it will not be difficult for courts to distinguish between protected activity under the FLSA and mere "abstract grumblings."

III. THE COURT SHOULD DEFER TO THE CONSISTENT, LONGSTANDING, AND WELL-REASONED INTERPRETATIONS APPLIED BY THE EEOC AND THE DEPARTMENT OF LABOR IN ADMINISTERING SECTION 215(a)(3).

The "specialized experience" of agencies administering statutes under their jurisdiction carries persuasive force that merits deference from courts. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The longstanding view of the EEOC and the Department of Labor has consistently read section 215(a)(3) to include informal, oral complaints. It was therefore an error for the Seventh Circuit to deny any weight to these interpretations by dismissing them as mere "litigating positions."

A. The EEOC and Department of Labor's Half-Century of Experience and Practice in Administering Section 215(a)(3) Is Entitled to Deference Under *Skidmore*.

This Court should defer to the interpretations of the EEOC and Department of Labor in consistently construing section 215(a)(3) to protect oral complaints. To the extent that the phrase "file any complaint" is unclear, these interpretations reflect a body of "specialized experience and broader . . . information" that typically receives deference from courts. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore*, 323 U.S. at 139). As the Court has recognized, longstanding, consistent, well-reasoned constructions of statutes merit deference because of "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade." *Skidmore*, 323 U.S. at 140.

Indeed, the EEOC and the Department of Labor have offered a consistent interpretation for over a half-century: "[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding duration.'" *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (quoting *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982)). Here, the broad construction offered by the EEOC and the Department of Labor has not changed, nor has the justification for that construction changed in the last fifty years. *See Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,115 (D. Utah 1961) (ruling in favor of the Secretary of Labor's broad construction of section 215(a)(3) and finding it "most unreasonable" that an employee would be excluded from its protection for "hav[ing] the courtesy . . . to confer with his employer" prior to submitting an official complaint).

The EEOC has been consistent and unambiguous in interpreting section 215(a)(3). In administering the Equal Pay Act, a part of the FLSA, the EEOC has taken the clear position that to "file any complaint" encompasses "making either formal or informal complaints." Equal Employment Opportunity Commission, Compliance Manual § 10-VII (2000). As several successful enforcement actions demonstrate, this construction has been consistently applied to cover oral complaints similar to those at issue here. *See, e.g.*, *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985 (6th Cir. 1992) (ruling in favor of EEOC's position that unofficial, oral complaints are covered by section 215(a)(3)); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989) (same). These consistent, well-reasoned views of the EEOC constitute a "'body of experience and informed judgment' to which [the Court] may resort for guidance." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 n.9 (2003) (deferring to persuasive policy statements in EEOC Compliance Manual) (quoting *Skidmore*, 323 U.S. at 140).

The Department of Labor has similarly applied a broad and consistent interpretation of section 215(a)(3) for an even longer period of time. As early as 1961, the Secretary of Labor successfully asserted that the retaliation provisions of section 215(a)(3) necessarily cover oral complaints. *Goldberg*, 43 Lab. Cas. (CCH) ¶ 31,155. In the half-century since *Goldberg*, the Secretary of Labor has stood firmly behind the same interpretation of "file any complaint." In *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), for example, the Secretary brought a lawsuit on behalf of an employee who was fired after verbally protesting potentially unlawful conduct. *Id.* at 181. The Secretary has not wavered from this expansive reading of the statute.

See, e.g., *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872 (2d Cir. 1988) (ruling in favor of the Secretary of Labor where employees orally "insisted upon or refused to repudiate rights . . . under the FLSA").

The Secretary's views are expressed even more clearly in the myriad *amicus* briefs filed by the Secretary in FLSA litigations over the past several decades. *See* Informal Brief for the Secretary of Labor and the EEOC as Amici Curiae in Support of Plaintiff-Appellant, *Jafari v. Old Dominion Transit Mgmt. Co.*, No. 09-1004 (4th Cir. 2009) (arguing against "any interpretation of section 15(a)(3) that discourages an employee from complaining to his employer"); Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part at 9-12, *Kilpatrick v. Serv. Merch., Inc.*, No. 98-31423 (5th Cir. 1999) (arguing that section 215(a)(3) should cover an unwritten, oral complaint and that it should not be read to "restrict[] the place or form of filing"); Brief for the Secretary of Labor as Amicus Curiae Supporting the Petitioner for Rehearing with Suggestion for Rehearing En Banc at 6, *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (Nos. 96-36017, 96-36266 and 96-36267) ("[A] complaint need not be in writing to be 'filed.' . . . Nothing in the language of Section 15(a)(3) suggests that Congress intended to distinguish between written and oral complaints . . . ."). In the present case, the Secretary continues to advance the exact same construction of the statute. Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 14-20, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).

Moreover, the Secretary's longstanding construction is thoroughly considered to achieve the FLSA's legislative purpose of "foster[ing] a climate in which compliance with the substantive provisions of the [FLSA] would be enhanced." *Robert DeMario Jewelry*, 361 U.S. at 292.

B. The Consistent and Longstanding Views of the Secretary of Labor and the EEOC Should Not Have Been Dismissed as Mere *Post Hoc* Litigating Positions.

In erroneously dismissing the longstanding, consistent, well-reasoned views of the Secretary as a mere "litigating position," the Seventh Circuit misapplied the Court's holding in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), that mere litigating positions are not entitled to deference.

The Court has held that *Skidmore* deference is inappropriate only to interpretations that are "wholly unsupported by regulations, rulings, or administrative practice," and are, in reality, "nothing more than an agency's convenient litigating position." *Id.* at 212-13. Contrary to the Seventh Circuit's interpretation, the fact "that the Secretary's interpretation comes to [the Court] in the form of a legal brief" does not "make it unworthy of deference." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *accord Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). The Court has specifically held that where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question," that interpretation—even if presented "in the form of a legal brief"—

should receive deference. *Auer*, 519 U.S. at 462; *see also Barnhart*, 535 U.S. at 221. The longstanding and consistent nature of the agency interpretations at issue here places them outside the narrow scope of *Georgetown University Hospital*.

In fact, even if the Secretary was offering this interpretation for the first time, "deference to an interpretation offered in the course of litigation is still proper as long as it reflects the 'agency's fair and considered judgment on the matter.'" *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (quoting *Auer*, 519 U.S. at 462). "The Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Old Ben Coal Co. v. Dir., Office of Workers Comp. Progs.*, 292 F.3d 533, 542 n.8 (7th Cir. 2002) (quoting *Georgetown Univ. Hosp.*, 488 U.S. at 212). Therefore, it is entitled to stand or fall based on its own persuasive force. *See, e.g., Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002) (finding an agency interpretation offered during litigation nevertheless to be persuasive under *Skidmore*); *Fontana v. Caldera*, 160 F. Supp. 2d 122, 130 (D.D.C. 2001) ("There is nothing in the record that indicates that the [agency's litigating] position . . . is anything other than its 'considered opinion.'"). The court below erred in refusing to consider the persuasiveness of the agency interpretations.

As noted above, the Secretary's position is completely consistent with the intent of Congress. Thus, the Seventh Circuit should not have disregarded the longstanding, well-reasoned position of the Secretary of Labor and the EEOC. Instead the

Court should defer to agency expertise in resolving any ambiguities in the statutory language of section 215(a)(3).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the Seventh Circuit's decision and find that an oral complaint of a violation of the FLSA is protected conduct under 29 U.S.C. § 215(a)(3).

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No. 09-834

In The
Supreme Court of the United States

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KEVIN KASTEN,

Petitioner,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF THE NATIONAL EMPLOYMENT LAW PROJECT, INTERFAITH WORKER JUSTICE, LEGAL AID SOCIETY, LEGAL MOMENTUM, NATIONAL DOMESTIC WORKERS ALLIANCE, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, RESTAURANT OPPORTUNITIES CENTER UNITED, TEXAS RIOGRANDE LEGAL AID, SOUTHERN POVERTY LAW CENTER, CALIFORNIA RURAL LEGAL ASSISTANCE, INC., UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AND THE EQUAL JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Brock v. On Shore Quality Control Specialists, Inc., 811 F.2d 282 (5th Cir. 1987) 23

Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987) 19

Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) 28, 29

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895 (1945) 17

Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128 (W.D.N.Y. 2003) 17

Daniel v. Winn-Dixie Atlanta, Inc., 611 F. Supp. 57 (N.D. Ga. 1985) 19

Darveau v. Detecon, Inc., 515 F.3d 334 (8th Cir. 2008) 17

Dice v. Weiser Sec. Servs. Inc., No. 06-61133, 2008 WL 269513 (S.D. Fla. Jan. 29, 2008) 30

Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058 (9th Cir. 2000) 15, 23

Falcon v. Starbucks Corp., 580 F. Supp. 2d 528 (S.D. Tex. 2008) 24

Flores v. Albertson's Inc., No. CV 01-0515, 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003) 32

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Flores v. Amigon d/b/a Flor Bakery, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) 24

Itzep v. Target Corp., 543 F. Supp. 2d 646 (W.D. Tex. 2008) 32

Javier v. Garcia-Botello, 211 F.R.D. 194 (W.D.N.Y. 2002) 23

Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) 9

Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999) 17

McFarland v. Guardsmark, 538 F. Supp. 2d 1209 (N.D. Cal. 2008) 30

Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 79 S.Ct. 260 (1959) 19

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960) 11, 12, 21

People ex rel. Dept. of Labor v. MCC Home Health Care, Inc., 339 Ill. App. 3d 10, 790 N.E.2d 38 (2003) 28, 29

Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560 (W.D. Mo. 1990) 19

Quintanilla v. A & R Demolition, Inc., No. Civ.A. H-04-1965, 2005 WL 2095104 (S.D. Tex. Aug. 30, 2005) 30

Scott v. Aetna Services, Inc., 210 F.R.D. 261 (D. Conn. 2002) 24

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Singh v. Jutla & C.D. & R's Oil, Inc., 216 F. Supp. 2d 1056 (N.D. Cal. 2002) 24

Songer v. Dillon Resources, Inc., 636 F. Supp. 2d 516 (N.D. Tex. 2009)..30

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S.Ct. 698 (1944) 18

Thomas v. S.E.A.L. Sec. Inc., No. 04 Civ. 10248, 2007 WL 2446264 (S.D.N.Y. Aug. 30, 2007)...........31

Vaicaitiene v. Partners in Care, Inc., No. 04 Civ. 9125, 2005 WL 1593053 (S.D.N.Y. July 6, 2005) 28

Wilke v. Salamone, 404 F. Supp. 2d 1040 (N.D. Ill. 2005) 31

Williams v. Grimes Aerospace Co., 988 F. Supp. 925 (D.S.C. 1997) 33

Wilson v. Guardian Angel Nursing, Inc., No. 3:07-0069, 2008 WL 2944661 (M.D. Tenn. July 31, 2008)...28

Wirtz v. Cont'l Fin & Loan Co. of W. End, 326 F.2d 561 (1964)..23

STATUTES

29 U.S.C. § 202(a)..17

29 U.S.C. § 215(a)(3)...*passim*

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OTHER AUTHORITIES

David Bensman, *Stuck on the Low Road,* The American Prospect, Oct. 2009 30

Bernhardt *et al.*, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (September 2, 2009) 22

Andrew Brunson, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269 (2008) 24

David Jason Fischer & Jeremy Reiss, Ctr. for an Urban Future and Community Serv. Soc'y, *Closing the Skills Gap: A Blueprint for Preparing New York City's Workforce to Meet the Evolving Needs of Employers* (January 2010) 34

Steven Greenhouse, *Forced to Work Off the Clock, Some Fight Back*, N.Y. Times, Nov. 19, 2004 22

Leslie Kaufman, *Can't Read, Can't Write, Can Hide It*, N.Y. Times, October 31, 2004, Section 10 .....34, 35

T. Alan Lacey and Benjamin Wright, *Occupational Employment Projections to 2018*, Monthly Lab. Rev. 93 (November 2009) 27

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Nat'l Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006) 27

Nat'l Employment Law Project, *How do Workers Make Complaints about Working Conditions? Finding from the 2008 Unregulated Work Survey*, June 14, 2010 ..... 14, 25

Restaurant Opportunities Ctr. of N.Y. & N.Y.C. Restaurant Indus. Coal., *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* (Jan. 25, 2005) 27

Jeremy Schwartz, *More Workers Seeing No Pay for Their Labor*, Austin-American Statesman, May 18, 2009 23

Urban Inst., *Immigrant Families and Workers: Facts and Perspectives* (November 2003) 35

U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *A First Look at the Literacy of America's Adults in the 21st Century* (December 15, 2005) 34

U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Literacy in the Labor Force: Results from the National Adult Literacy Survey* (September 1999) 34

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U.S. Dep't of Labor, *Statement by US Secretary of Labor Hilda L. Solis on Wage and Hour Division's Increased Enforcement and Outreach Efforts* (Nov. 19, 2009) 13

U.S. Gov't Accountability Office, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Work Classification* (July 2006) 28

U.S. Gov't. Accountability Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve Compliance* (July 15, 2008) 12

U.S. Gov't. Accountability Office, GAO-09-458T, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft* (March 25, 2009) 12

Wage and Hour Div., U.S. Dep't of Labor, *Nursing Home 2000 Compliance Survey Fact Sheet* 27

David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59 (2005) 12, 13, 21

David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (June 2010) 13

Rose A. Woods, *Industry Output and Employment Projections to 2018*, Monthly Lab. Rev. 58 (November 2009) 27

INTEREST OF THE *AMICI CURIAE*[1]

The National Employment Law Project (NELP) is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. Protecting workers who have come forward to inquire or complain orally about workplace rights is a critical component to these protections. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act (FLSA), as well as other workplace laws.

Interfaith Worker Justice (IWJ) is a national organization that calls upon religious values to improve wages, benefits, and working conditions for workers by educating and organizing current and future religious leaders, interfaith groups, and worker centers. IWJ supports a network of more than 60 affiliates, including 27 worker centers. IWJ worker center members work in restaurants, manufacturing, construction, poultry processing, day labor, janitorial, retail, and other service industries. Approximately 80 percent of workers who come to the IWJ-affiliated worker centers report having been victims of wage theft. They are routinely threatened with termination or other discipline when they complain about pay or other conditions of work. Most of the worker centers' members are low-wage and immigrant workers who on their own would not file written complaints with their employers or with government agencies. They must be protected from retaliation for verbally asserting their rights.

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[1] *Amici* have obtained written consent from all parties to file this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society's Civil Practice operates offices in all five boroughs of New York City providing comprehensive legal assistance in housing, public assistance, and other areas of primary concern to low-income clients. The Society's Employment Law Project represents low-wage workers in employment-related matters such as unemployment insurance hearings, claims for unpaid wages, and claims of discrimination. The Project conducts litigation, outreach, and advocacy designed to assist the most vulnerable workers in New York City, among them, workers who have been terminated for complaining to supervisors about illegal workplace practices. Many of these clients do not read or write any language at more than a basic level.

Founded in 1970 as the NOW Legal Defense and Education Fund, Legal Momentum is the nation's oldest legal advocacy organization dedicated solely to advancing the rights of women and girls. Since its inception, Legal Momentum has been at the forefront of litigation, policy development, and public education on issues related to women's equality and rights, including workplace rights. Legal Momentum advocates strong and vigorous enforcement of federal worker protection laws including the provisions protecting complaining workers against retaliation. Legal Momentum pays special attention to the protection of women who are vulnerable or marginalized, including low-wage workers, a disproportionate share of whom are women.

The National Domestic Workers Alliance (NDWA) is a national alliance of over 27 domestic worker groups in 17 cities across the country. NDWA endeavors to improve the working and living conditions of domestic workers through state legislative proposals and federal regulatory reform to establish core labor standards and stronger enforcement. Excluded from some of the most basic workplace protections, domestic workers are among the most vulnerable workers in the country, working in isolation and suffering egregious violations of the FLSA. Many domestic workers – and live-in ones in particular – are likely to complain orally to their employers. Limiting the anti-retaliation protection to those who file in writing would exclude an overwhelming number of domestic workers who are the most in need of such protection.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been treated illegally in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized.

Restaurant Opportunities Center United is a national restaurant workers' organization that seeks to improve the working conditions of restaurant workers through promoting national policies, conducting national research on the restaurant industry, and developing and providing training and technical assistance to restaurant worker centers. The restaurant industry is currently one of the largest private sector employers nationwide and one of the fastest growing industries in most regions across the country. Yet too many workers suffer from low wages, poor working conditions, and retaliation for asserting their rights to the minimum wage or overtime pay. When restaurant workers inquire or orally complain to their immediate supervisors regarding their wages or rates of pay, they are often retaliated against by being terminated or by having their hours significantly reduced. These workers, like many other workers in the low-wage sector who come forward to complain to their employers orally, must be afforded protection under the FLSA.

Established in 1970, Texas RioGrande Legal Aid (TRLA) provides free civil legal assistance, including representation on employment claims, to the poor in a 68-county service area covering central, south, and west Texas. TRLA and its Southern Migrant Legal Services (SMLS) project in Nashville, Tennessee also represent migrant farm workers on employment matters who work or are based in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee, and Texas. The farm worker and other low-wage worker clients of TRLA and SMLS experience rampant retaliation for complaining about wage theft and other violations of their workplace rights. Many of these workers have difficulty making written complaints because they speak only Spanish or an indigenous language, are marginally literate at best in any language, or are foreign guest workers unfamiliar with the U.S. legal system.

The Southern Poverty Law Center has enforced civil rights protections since 1971, and its Immigrant Justice Project (IJP) has represented thousands of low-wage workers in wage claims across nine Southern states since 2004, collecting millions of dollars in unpaid wages. IJP's advocacy focuses on employers who routinely and flagrantly disregard relevant minimum wage, overtime, anti-discrimination, and other legal protections. IJP frequently reaches out to workers to inform them of basic rights under the FLSA and similar employment statutes. IJP has encountered many workers afraid to join lawsuits, complain to state or federal agencies, consult with legal counsel about their workplace rights, or address their employers directly regarding known or suspected violations of the FLSA. A failure to protect workers in their informal or oral attempts to enforce the rule of law would render employment laws entirely meaningless. IJP joins this brief to protect the rights of its clients and other workers who, through necessity, fear, or desire to avoid litigation, protest FLSA violations without written complaints.

California Rural Legal Assistance, Inc. (CRLA) is a California not-for-profit corporation founded in 1966 to provide a wide range of free legal assistance and representation to low-income communities throughout rural California. CRLA provides legal services to the poor in 16 California counties, serving a poverty population of over 555,000 in a range of industries, including agriculture, landscaping, construction, janitorial, and service jobs. CRLA's lengthy experience enables it to understand and speak authoritatively to the characteristics of seasonal, short-term, low-wage employment, overwhelmingly offered through intermediary contractors, that are the core of California agricultural employment. Agricultural employment is also characterized by a widespread perception among workers that they are replaceable at the proverbial drop of a hat – a fear held nearly equally among authorized workers, those who are unauthorized immigrants, and U.S. citizens. Most of the workers seen by CRLA have limited English or limited written literacy. Limiting anti-retaliation protections to situations where they can prepare and submit a written complaint will severely impair their ability and willingness to raise issues such as the failure to pay minimum wage and overtime.

United Food and Commercial Workers International Union (UFCW) represents more than 1.3 million workers in a variety of industries throughout the United States, including primarily the retail and meatpacking, food processing, and poultry industries. More than 250,000 members work in meatpacking and poultry. The UFCW supports broad enforcement of the FLSA through a comprehensive mechanism for initiating complaints as necessary to support the fulfillment of labor rights in the very diverse, complex, and stratified work environments of today.

The Equal Justice Center (EJC) is a non-profit employment justice organization with offices in Austin and San Antonio, Texas, specializing in promoting workplace fairness for low-income working men and women. The EJC, and its affiliated clinical educational program at the University of Texas Law School, provide legal services and employment rights assistance to help low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people throughout Texas in their efforts to recover unpaid wages and protect their rights under the FLSA. One of the most pernicious barriers that our clients face in trying to secure their FLSA wage protections is retaliation and threats of retaliation against employees who voice complaints. Our clients are far more likely to approach their employer with a verbal complaint about wage violations than with a formal, written complaint. This is because a verbal complaint seems less confrontational, less risky, more conciliatory, and more likely to be successful in resolving the wage violation. Our clients have a vital interest in a decision by this Court reversing the Circuit Court's ruling below, which will otherwise seriously undermine their basic wage protections.

Amici submit this brief not to repeat the arguments made by the parties, but to bring our unique perspective of the realities of low-wage workers to this Court's attention and to urge the Court to consider the large number of workers in today's modern workplaces whose rights would be undermined by a narrow requirement that complaints be provided in writing in order for anti-retaliation protections to apply.

STATEMENT OF THE CASE

Petitioner seeks review of a June 29, 2009 decision by the Seventh Circuit Court of Appeals, which affirmed the dismissal of Petitioner's retaliation claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), holding that Petitioner's oral complaints were not protected activity under the Act's anti-retaliation provision because "FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009). *Amici* submit this brief in support of the Petitioner.

◆

SUMMARY OF THE ARGUMENT

As courts have long recognized, the purpose of the Fair Labor Standards Act's (FLSA) anti-retaliation provision in 29 U.S.C. § 215(a)(3) is to effectuate compliance by encouraging employees to report wage and hour violations. Workers already legitimately fear employer reprisals for making wage and hour complaints, and a narrow reading of the anti-retaliation provision will only heighten the chilling effect that keeps workers from asserting their rights under the statute. For a variety of reasons, including a hope or necessity of a quicker remedy through informal discussion, unfamiliarity with their rights and the ways to remedy violations, language and literacy limitations, and confusion about the proper person(s) to whom to complain, workers are likely to voice their concerns orally with their supervisor or employer. A rigid reading of the anti-retaliation provision of the FLSA leaves unprotected the kind of informal, internal complaints on which our nation's lowest paid workers in particular rely to assert their workplace rights.

Enforcement of the FLSA depends on employees coming forward to report violations of the law.

Research has shown that the overwhelming majority of wage and hour complaints in low-wage industries are made orally by workers to an employer or supervisor. These low-wage workers are the ones most in need of protection when they do inquire or complain about wage and hour matters. Excluding oral complaints from protection under § 215(a)(3) would discourage informal resolution of workplace inquiries or complaints, and would provide employers with a perverse incentive to retaliate against workers as soon as they orally object to a potential violation of their rights under the FLSA. It would also leave unprotected those workers in workplaces where the primary communication with employers is oral, including workplaces that are decentralized, dispersed, or paperless, or workplaces where workers face literacy barriers.

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ARGUMENT

I. A NARROW READING OF SECTION 215(a)(3) THAT DOES NOT PROTECT ORAL COMPLAINTS WILL FRUSTRATE THE PURPOSES OF THE FLSA, WHICH RELIES ON INDIVIDUAL WORKER COMPLAINTS FOR ITS ENFORCEMENT.

The enforcement of the FLSA depends on individuals coming forward to report violations of the law. Workers, particularly low-wage workers, frequently communicate their complaints orally, and already justifiably fear retaliation when asserting their rights under the Act. As courts have long recognized, § 215(a)(3) is the cornerstone for upholding FLSA's complaint-driven enforcement scheme. A rigid reading of this anti-retaliation provision to exclude oral complaints from protection would severely frustrate the FLSA's enforcement by deterring workers from speaking up, discouraging informal resolution of wage and hour disputes, and providing employers with a perverse incentive to retaliate against workers after they have made an oral complaint but before they have committed this complaint to writing.

A. Enforcement of the FLSA Depends on Individual Workers' Reports and Must Encourage and Protect Oral Complaints in Order to Prevent Violations.

As this Court recognized a half-century ago, "Congress did not seek to secure compliance with [the FLSA] through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S.Ct. 332, 335 (1960).

To trigger enforcement of the Act, workers may complain to their employer or to the U.S. Department of Labor (DOL). Worker complaints are virtually the only way that violations are brought to the attention of the DOL or the courts, because workers know what is happening in their workplaces and have an incentive to come forward if something seems wrong. Most workers, and low-wage workers in particular, complain or inquire orally first. *See* discussion at Section III, *infra*. These oral inquiries and complaints must be encouraged and protected.

"For weighty practical and other reasons," *Mitchell*, 361 U.S. at 292, 80 S.Ct. at 335, the Wage and Hour Division (WHD) of the DOL relies heavily on worker complaints, as opposed to self-initiated inspections, in its enforcement of the FLSA. In recent reports, the U.S. Government Accountability Office found that 72 percent of the WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers,[2] and also found that the WHD often relies on *oral* communications with workers to receive complaints of violations.[3] The WHD

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[2] U.S. Gov't Accountability Office, GAO-08-962T, *Better Use of Available Resources and Consistent Reporting Could Improve Compliance* 7 (July 15, 2008). *See also* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004 complaint inspections constituted about 78 percent of all inspections undertaken by WHD, an increase from about 70 percent in the mid 1990's); U.S. Gov't Accountability Office, GAO-09-458T, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft* 1 (March 25, 2009) ("[C]onducting investigations based on complaints is WHD's first priority.").

[3] *Id.* at 18 (noting that wage theft victims may file complaints with WHD in writing, over the phone, or in person). The WHD also encourages workers to call them with questions or concerns about their workplace. Its website, on a page entitled

(Continued on following page)

needs help from workers unafraid to come forward in order to do its job. For a host of reasons, including lack of resources and an expansion of covered workplaces and laws to enforce, the likelihood of an affirmative investigation by the DOL not triggered by a worker complaint, even among low-wage workplaces with documented histories of wage and hour violations, is infinitesimal.[4]

"How to File a Complaint: General Information for Workers," explains that "[i]f you have questions or concerns, you can contact us at 1-866-487-9243." http://www.dol.gov/wecanhelp/howtofilecomplaint.htm. Under its "Frequently Asked Questions" section, the website explains that workers "can call or visit any Wage and Hour Office to ask about the laws or file a complaint. [They] can also call WHD's toll-free help line." http://www.dol.gov/wecanhelp/faq.htm. Similarly, a PowerPoint presentation available on the website explains that "[g]enerally complaints are submitted in person or by phone," and instructs workers to "[c]all the WHD toll-free information and helpline at 1-866-4US-WAGE (1-866-487-9243)." http://www.dol.gov/wecanhelp/presentation/1.htm

[4] Weil & Pyles, *supra* note 2, at 62 (the annual probability of receiving an inspection for one of the 7 million establishments covered by OSHA or FLSA is well below 0.001 percent); David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* 6 (June 2010), http://ssrn.com/abstract=1623390 (the annual probability of one of the top twenty fast food restaurants receiving an investigation is approximately 0.008). This near-total reliance on individual complaints may soon be reversed to some extent. On November 19, 2009, the DOL announced that the WHD would hire 250 new investigators, in part in order to pursue more effective affirmative targeted enforcement. U.S. Dep't of Labor, *Statement by US Secretary of Labor Hilda L. Solis on Wage and Hour Division's Increased Enforcement and Outreach Efforts* (Nov.

(Continued on following page)

In many workplaces, workers do not know how to contact the DOL or otherwise prepare and submit a written complaint to the DOL or to their employer. They may have limited literacy, have a low level of education, face language barriers, and have limited access to legal counsel or other means of finding out about their rights, as discussed *infra,* in Section III. When they do take action, their first step is likely to talk to a supervisor or their employer.

This means that worker complaints to employers are key to enforcement of the FLSA more generally. And because workers often raise questions and assert their wage and hour rights orally with their supervisor or employer – in low-wage industries, researchers have found that the overwhelming majority of workers (95.5 percent) make wage and hour complaints orally to an employer or supervisor – oral complaints and inquiries must be protected.[5]

Given the high percentage of workers making oral inquiries or complaints to their employers, an affirmation by this Court of the Seventh Circuit's decision would mean that employers would be permitted to lawfully terminate the majority of workers – low-wage workers in particular – who attempt to

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19, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm.

[5] Nat'l Employment Law Project, *How do Workers Make Complaints about Working Conditions? Finding from the 2008 Unregulated Work Survey*, June 14, 2010, *available at* http://www.nelp.org/page/-/Justice/2010/ComplaintMethodsFactSheet2010.pdf.

enforce their FLSA rights at their worksite. A rule that would leave these workers completely unprotected from retaliation would drastically undermine the enforcement of the FLSA.

B. Requiring Written Complaints Will Immunize Employers Engaging in Unlawful Retaliation.

The decision below immunizes employers whose workers voice complaints about wage and hour violations, and creates a perverse incentive for employers to retaliate against a complaining worker as soon as she makes an oral inquiry or complaint. If this Court were to adopt a rigid rule requiring written submissions, employers would be free to respond to an employee's oral question about or objection to pay practices with swift public termination to make an example of her, and could even make direct threats to her co-employees that they will be terminated if they also complain. Employers need not conceal their retaliatory motive under this rule – they can declare to an employee, in front of her coworkers, that she is being fired because she asked about her pay.

The incentive to thwart the law in this way, in addition to the real harm it inflicts on the complaining worker, frustrates the national interest in upholding the rights accorded under the FLSA. *See Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (in FLSA actions, "[e]mployee suits to enforce their statutory rights benefit the general public"). It also sends a powerful message to other employees in the workplace that they complain at their peril. *See Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 880 (2d Cir. 1980) (explaining that the retaliatory discharge of workers provides the employer with "the advantage of the fearful silence of the remaining employees. This silence, until broken by a judgment against the employer, provides the employer an opportunity for continued wrongdoing and strikes at the core of the complaint-based enforcement mechanism contemplated by the FLSA."). Even when there is a judgment against the employer on the underlying minimum wage or overtime violations, it often comes so late after the employer's retaliatory conduct that the damage is done. The message to the remaining employees is still a resounding "don't complain."

Because employees are usually the ones with the knowledge and incentive to report wage and hour violations, and because FLSA enforcement relies so heavily on their willingness to report these violations, the chilling effect of failing to protect oral complaints under § 215(a)(3), as discussed in Section II *infra*, would permit violations of core workplace standards to go unchecked.

C. Protecting Oral Complaints is Consistent With the Act's Purpose to Encourage Workers to Report Violations.

Congress passed the FLSA in order to eliminate abusive and exploitative labor conditions that adversely impact the "health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The "prime purpose" behind the statute's enactment was "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18, 65 S.Ct. 895, 902 n.18 (1945). Courts have long recognized the centrality of the anti-retaliation provision in protecting both the rights accorded under the FLSA and its complaint-driven enforcement scheme. *See, e.g., Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (8th Cir. 2008) ("The retaliation provision of the FLSA is a central component of the Act's complaint-based enforcement mechanism."); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (*en banc*) ("Construing the anti-retaliation provision to exclude from its protection all those employees who seek to obtain fair treatment and a remedy for a perceived violation of the Act from their employers would jeopardize the protection promised by the provision and discourage employees from asserting their rights."); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 135 (W.D.N.Y. 2003) ("It is well established that the anti-retaliation provision is critical to the entire enforcement scheme of the federal wage and hour law.").

This Court has cautioned that the FLSA is a "remedial and humanitarian" statute that "must not be . . . applied in a narrow, grudging manner." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 703 (1944). Protecting internal, oral, complaints is fully consistent with the text of § 215(a)(3). *See* Brief for the Petitioner at 31-44. Consistent with the *Tennessee Coal* Court's directive, the FLSA and its anti-retaliation provision have been interpreted in an expansive manner. For example, courts have found the need to protect employees from retaliation so compelling that they encompass acts not explicitly mentioned in the statute. In *Brock v. Casey Truck Sales, Inc.*, the Second Circuit held that the FLSA protected employees' refusal to repudiate, in a "loyalty oath," the overtime pay due to them. 839 F.2d at 879. The Third Circuit held that § 215(a)(3) protected an employee who was fired because his employer mistakenly believed that he had filed a complaint with the DOL, and noted that "courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language . . . [and in] each of these instances, the employee's activities were considered necessary to the effective assertion of employees' rights under the Fair Labor Standards Act, and thus entitled to protection." *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987).[6] These interpretations are consistent with the broad readings given to the FLSA. *See Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 264 (1959) ("[W]ithin the tests of coverage fashioned by Congress, the [FLSA] has been construed liberally to apply to the furthest reaches consistent with congressional direction.").

D. Workers' Oral Complaints Can Encourage Informal Resolution.

Amici's experiences and the reports noted *infra* show that employees make oral reports of workplace violations to their employers or supervisors for many reasons, including: (1) a hope for a quick resolution of their question or complaint through an informal discussion that would likely not result from their filing a written complaint; (2) a hope that an answer to their oral inquiry would not lead to a time-consuming government investigation or lawsuit; (3) a lack of familiarity with their rights and with government enforcement mechanisms; (4) literacy or language barriers, and (5) a belief that an employer who espouses an "open door policy" is sincere about wanting to learn of workers' concerns directly and orally before they are articulated in other ways.

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[6] *See also Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 563 (W.D. Mo. 1990) ("Other courts have interpreted § 215(a)(3) broadly and have not limited its protection to activities explicitly covered by its language."); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 58 (N.D. Ga. 1985) ("[The] plaintiff's contact with [the WHD], without her filing a complaint or testifying in any proceeding, was sufficient to trigger the protection of § 215(a)(3).").

Employers may also prefer the relative informality and efficiency of simple oral resolutions, and often enact policies to encourage workers to come forward with concerns in this way, as did the Respondents in this case. *See* Brief for the Petitioner at 5-7. Moreover, an employee's written complaint may "up the ante" – turning what should have been a simple question-and-answer interaction into a potentially adversarial action. Leaving workers unprotected in informal interactions creates incentives for them to simply remain quiet. Given these employee and employer inclinations and preferences, it makes little sense to discourage informal oral dispute resolution by leaving workers completely unprotected in those instances.

II. BECAUSE WORKERS ARE OFTEN FEARFUL OF RETALIATION, BROAD PROTECTIONS FOR ORAL COMPLAINTS ARE REQUIRED TO AVOID A CHILLING EFFECT.

Individual worker complaints about potential violations of the FLSA, either those received by an outside agency like the DOL or those received by an employer or supervisor, represent only a fraction of workers who suffer from wage and hour violations.[7] Many more workers are deterred from speaking up about potential violations because they fear retaliation and other employer reprisals, or because they may not know or understand their rights under the statute. For this reason, the anti-retaliation provision of the FLSA is central to the enforcement of the statute, for "[p]lainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances . . . [for] it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell*, 361 U.S. at 292, 80 S.Ct. at 335.

This fear of retaliation for speaking up about workplace violations is well-established[8] and well-founded: the incidence of employer retaliation in response to workers' complaints is high. One survey found that 43 percent of the low-wage workers who complained about violations of workplace standards were retaliated against – including being fired, suspended, or threatened with cuts in their hours or pay.[9] Among those workers who did not make a complaint, despite perceived violations, half said they feared they would be fired if they complained, and another 10 percent feared their wages or hours would be cut.[10]

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[7] *See, e.g.*, Weil & Pyles, *supra* note 2, at 69 (noting that the incidence of workers complaining is exceedingly low – an average of less than 25 complaint cases for every 100,000 workers).

[8] *Id.* at 83 (noting studies suggesting that "despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights").

News reports about wage and hour violations consistently cite workers' fear of retaliation, and document the negative repercussions among workers who do complain. In 2004, the New York Times reported the prevalence of employers across a number of industries forcing their employees to work "off-the-clock," and recounted workers' fear of coming forward to report these violations.[11] The report noted that workers who did complain "were weeded out and terminated."[12] Construction workers in Austin, Texas seeking to recover three weeks of unpaid wages explained to a reporter that "there are many others who are owed money, but sometimes because of fear or because they don't want to lose time, they don't fight."[13]

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[9] Bernhardt *et al.*, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 3 (September 2, 2009).

[10] *Id.*

[11] Steven Greenhouse, *Forced to Work Off the Clock, Some Fight Back*, N.Y. Times, Nov. 19, 2004 at A1 ("Although many employees fear retribution, a number of workers said they were now willing to talk because they were angry and involved in lawsuits seeking back pay. . . . Ms. Russel said she had considered, then ruled out, complaining to government officials, fearing retaliation by her bosses. 'I'm a single mom,' she said. 'I can't afford to be fired. I don't know if you've ever been in western New York, but it's the type of place where if you don't have a master's degree, all it is is Burger King or McDonald's jobs.' ").

[12] *Id.*

Courts have recognized workers' fear of retaliation in a variety of FLSA cases, for example, citing such fear when preserving the anonymity of other witnesses. In *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282, 284 (5th Cir. 1987), *citing Wirtz v. Cont'l Fin & Loan Co. of W. End*, 326 F.2d 561, 564 (1964), the Fifth Circuit held that the Secretary of Labor did not have to comply with interrogatories seeking the identities of all individuals who provided the DOL with information in a wage and hour dispute, noting that "'[t]he purpose for allowing the informers privilege . . . is to make retaliation impossible.'"

Courts also recognize this fear when permitting workers to proceed with FLSA actions using pseudonyms. *See, e.g., Does I Thru XXIII* 214 F.3d at 1069 (district court abused its discretion in denying employees permission to proceed with their FLSA action anonymously where employees, garment workers on the island of Saipan, alleged that disclosure of their true identities would result in termination, deportation from Saipan, and arrest and imprisonment upon their return to China); *Javier v. Garcia-Botello*, 211

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[13] Jeremy Schwartz, *More Workers Seeing No Pay for Their Labor*, Austin-American Statesman, May 18, 2009 at A1.

F.R.D. 194 (W.D.N.Y. 2002) (motion to proceed anonymously in FLSA action granted where court found plaintiffs had a well-founded fear of retaliation by employers who had been charged with threats of violence and intimidation).[14]

Fear of retaliation has also been cited as a factor behind employees' unwillingness to opt into FLSA class action suits. *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528, 538 (S.D. Tex. 2008) (low response rate by putative class members in FLSA class action did not justify decertification because "[i]ndividuals may have myriad reasons for not wishing to opt-in to a lawsuit against their employer ranging from fear of retaliation to sheer inertia . . . "); *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 267 (D. Conn. 2002) (noting that there was evidence that "potential class members failed to join the FLSA class action because they feared reprisal").[15]

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[14] Immigrant workers in particular face severe chilling effects when employers retaliate against them for standing up for their FLSA rights. In *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002), a district court held that an employee whose employer turned him into the then-INS the day after settling a claim for unpaid wages had stated a claim for retaliation under § 215(a)(3). *See also Flores v. Amigon d/b/a Flor Bakery*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (stating that an inquiry into immigration status in FLSA action would "effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation").

[15] *See also* Andrew Brunson, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 286 (2008).

In addition, in granting injunctive relief to remedy an employer's retaliatory conduct under the FLSA, courts have expressly recognized that such retaliatory conduct chills other employees from asserting their own rights. In *Bailey v. Gulf Coast Transportation, Inc.*, 280 F.3d 1333, 1336, 1337 n.6 (11th Cir. 2002), the court granted injunctive relief for violations of § 215(a)(3), explaining that an injunction would help effectuate the purpose of the anti-retaliation provision, where the plaintiffs had already declared that others "feared participating in the suit" because of the employer's retaliatory conduct and where one plaintiff "withdrew his Consent to Join form with the understanding that he would be reinstated if he pulled out of the lawsuit."

III. REQUIRING WRITTEN COMPLAINTS WILL EXCLUDE LARGE SEGMENTS OF TODAY'S WORKFORCE FROM PROTECTION UNDER SECTION 215(a)(3).

In a recent study, 95.5 percent of low-wage workers surveyed made wage and hour complaints orally to an employer or supervisor.[16] This is in part due to the characteristics of the modern workplace.

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[16] Nat'l Employment Law Project, *supra* note 5. When asked "how did you make [a] complaint," survey responses included "discussed the problem with supervisor or employer" (95.5 percent); "filed a complaint with an agency, like the Department of Labor or OSHA" (1.2 percent); "asked a lawyer, union representative, worker center, or other community group to complain

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The U.S. workforce is varied, with many workers in virtually all sectors of our economy working in decentralized jobs and complicated employment schemes. Many of these workplaces may not have protocols and procedures in place for workers to file written complaints. In many industries, workers primarily engage with their employers orally; particularly in workplaces where there are few, if any, documents exchanged between employers and employees. The U.S. workforce also has a large share of workers who face literacy limitations and language barriers. For all of these workers, a requirement that wage and hour complaints must be filed in writing would pose such significant hurdles that these workers would effectively be excluded from the FLSA's anti-retaliation protection.

A. Filing Written Complaints Would be Impractical for Workers Who Primarily Communicate With Their Employers Orally, Including Workers in Dispersed, Paperless or Contingent Jobs.

Many of today's workplaces, especially in industries with the largest projected job growth,[17] are

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to employer on your behalf" (2.0 percent); and "made oral complaint to supervisor, combined with at least one other form of complaint" (1.3 percent). *Id.*

[17] According to projections through 2018 from the Bureau of Labor Statistics, industries with the largest job growth include

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characterized by dispersed, contingent, and paperless jobs, where oral communication may be the only way that workers and their employers interact. In 2005, an estimated 31 percent of the U.S. workforce were contingent workers in temporary or subcontracted jobs, or were treated as independent contractors, with no clear employer responsible for compliance with

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construction, employment services, home health care, and services to buildings and dwellings and retail, and occupations with the greatest growth will include waiters and waitresses, construction laborers, truck drivers, carpenters, and security guards. Rose A. Woods, *Industry Output and Employment Projections to 2018*, Monthly Lab. Rev. 58 tbl.4 (November 2009); T. Alan Lacey and Benjamin Wright, *Occupational Employment Projections to 2018*, Monthly Lab. Rev. 93 tbl.5 (November 2009). Many of the jobs in high-growth industries have persistently high violations of wage and hour laws. Government and private studies from the past few years show that many of our fastest-growing jobs have appalling minimum wage and overtime compliance rates. *See, e.g.,* Restaurant Opportunities Ctr. of N.Y. & N.Y.C. Restaurant Indus. Coal., *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* 14 (Jan. 25, 2005) (a majority of restaurant workers in New York City reported experiencing violations of minimum wage or overtime laws); Wage and Hour Div., U.S. Dep't of Labor, *Nursing Home 2000 Compliance Survey Fact Sheet*, *available at* http://www.dol.gov/whd/healthcare/surveys/nursing2000.htm (60 percent of nursing homes are out of compliance). For more statistics and information on the numbers of workers in the growing job sectors, *see* Nat'l Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006), http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf.

wage and hour protections.[18] Many of these workers do not report to a central office and have virtually no daily contact with their employers. Most of their employers have no human resource departments and no systems for written complaints. Furthermore, workplaces with large concentrations of low-wage workers tend to have very little, if any, documents exchanged between employers and employees. Requiring workers in these workplaces to file written complaints would be unworkable, and would result in their exclusion from protection under § 215(a)(3).

In high-growth jobs like home health care, temporary staffing, construction, trucking, and security, workers' primary interaction with their employers is oral, making written complaints impractical. For example, home health care workers are often hired by an agency that places them in homes or other institutions.[19] Typically, assignments are given and received over the telephone.[20] Employees report directly

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[18] U.S. Gov't Accountability Office, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Work Classification* 3 (July 2006). 31 percent of the workforce translates to about 42.6 million workers, according the U.S. GAO report on contingent workers.

[19] *See, e.g., Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988); *Vaicaitiene v. Partners in Care, Inc.*, No. 04 Civ. 9125, 2005 WL 1593053 (S.D.N.Y. July 6, 2005); *People ex rel. Dept. of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 790 N.E.2d 38 (2003).

[20] *See, e.g., Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2008 WL 2944661, at *5 (M.D. Tenn. July 31, 2008) (noting that licensed practical nurses, after being placed on an

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to their assigned job sites, where they work with disabled and elderly individuals for months with little or no in-person contact with their agency employer.[21] While many agencies conduct site visits to the employees' job sites, the purpose of these visits is typically to check on the health status of the housebound client, usually take place only once or twice a month, and are often conducted by other staff employed by the agency when the employee is not present.[22]

Similarly, construction workers, security guards, and truck drivers would find it difficult to submit written complaints, for all of these jobs entail being dispatched to various job sites or spending work time on the road, away from their employers' main offices and in locations where oral communication is the predominant way in which they interact with their supervisors and employers. Construction workers generally begin and end their work days at construction

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"active list," are then called by the agency when an assignment becomes available).

[21] *See, e.g., id.* at *6-7 ("[Licensed Practical Nurses] are not required to come into any of Defendants' offices, and rarely do so. Telecommunication from the clients' homes to Defendants' offices is thus paramount.").

[22] *See, e.g., Brock*, 840 F.2d at 1057 (noting that the referring agency conducted job site visits with nurses only once or twice a month); *MCC Home Health Care, Inc.*, 339 Ill. App. 3d at 14-15, 790 N.E.2d at 40 (noting that to ensure patient satisfaction, the referring agency conducted job sites visits when the assigned nurse was not present).

sites, rarely reporting to an employer's office.[23] Truck drivers have similar work days, where the bulk, if not all, of their work time is spent on the road driving from one location to another.[24] Drivers generally receive their assignments through radio dispatch services and often wait hours at ports and warehouses to pick up or drop off transported loads.[25] Security guards, many of whom work for employers who contract their services to businesses throughout a city, state, or region, are similarly dispatched to remote client sites, isolated from their co-workers, and rarely required to report to the employer's central office.[26]

In the jobs described above, and in many others, oral communication is the most practical and natural way for workers to communicate with their employers on any matter related to their work. This is particularly the case in situations where an immediate response is necessary in order to prevent a FLSA violation. For example, in *Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1043-44 (N.D. Ill. 2005), a group of carpenters working on a residential construction site alleged that their supervisor told them that they had to work on their day off "on their own time [or] he was going to terminate them." When the workers immediately protested, saying that they would not work for free, they were terminated. *Id.* at 1044. It would be illogical to require these workers – on a construction site, and not likely having pen and paper in hand – to stay silent until they found the opportunity to draft and hand over a written complaint, rather than raise their concerns on the spot in order to prevent a violation of their rights.[27] To require written communication in the first instance would leave these types of workers with an unappealing choice – quietly suffer a violation with no remedy, or complain orally to try to prevent a violation and thus become vulnerable to legally-permissible retaliation.

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[23] *See, e.g., Quintanilla v. A & R Demolition, Inc.*, No. Civ.A. H-04-1965, 2005 WL 2095104 (S.D. Tex. Aug. 30, 2005). In *Quintanilla*, construction workers worked on construction sites in Houston while their employer's office headquarters was in Austin. As a result, their paychecks were delivered to them at their construction sites. *Id.* at *4.

[24] *See, e.g., Songer v. Dillon Resources, Inc.*, 636 F. Supp. 2d 516 (N.D. Tex. 2009).

[25] *Id.* at 520; David Bensman, *Stuck on the Low Road,* The American Prospect, Oct. 2009, *available at* http://www.prospect.org/cs/articles?article=stuck_on_the_road.

[26] *See, e.g., McFarland v. Guardsmark*, 538 F. Supp. 2d 1209, 1210 (N.D. Cal. 2008); *Dice v. Weiser Sec. Servs. Inc.,* No. 06-61133, 2008 WL 269513, at *1-2 (S.D. Fla. Jan. 29, 2008).

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[27] As the court noted in *Wilke*, "[i]f an employee has been told that he will not be paid, but nonetheless will be fired if he does not work, he need not work the hours, await his next deficient paycheck, and then complain, in order to have a retaliation claim in the event the employer makes good on that threat." 404 F. Supp. 2d at 1048. *See also Thomas v. S.E.A.L. Security, Inc.*, No. 04 Civ. 10248, 2007 WL 2446264, at *2 (S.D.N.Y. Aug. 30, 2007), where a security guard was orally instructed by his supervisor to relieve a co-worker before the official start of his shift, he immediately asked his supervisor whether he was going to be paid overtime for these additional hours. When his supervisor told the plaintiff that he should raise the issue with the director of his department, the plaintiff relieved his co-worker, accruing overtime hours. *Id.* The next day, the plaintiff received an official reprimand for being belligerent in his questioning. *Id.*

Finally, the rise of contingent structures in many jobs means that workers may be confused about who their employers are and may need to make preliminary oral inquiries before making a formal complaint in writing.[28] When employees work in environments where their rights under the FLSA are not posted, where they are told that they are not employees, and where they are paid in cash or with no records or explanations of their pay and hours, or the identity of their employer, their first recourse is often to approach their employers or supervisors orally with questions regarding their status, required wages, and rates of pay.

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[28] These complicated employment schemes are common. In *Itzep v. Target Corp.*, 543 F. Supp. 2d 646, 649 (W.D. Tex. 2008), janitors were hired by a contracting company to clean Target stores in Texas and worked under a complex employment sharing setting where both Target and the contracting company supervised their daily work. In *Flores v. Albertson's Inc.*, No. CV 01-0515, 2003 WL 24216269, at *3-4 (C.D. Cal. Dec. 9, 2003), janitors who were hired by subcontractors to provide janitorial services to three large supermarket companies throughout California were paid by the subcontractors while their day-to-day supervision came principally from the supermarkets. In these contingent structures, if workers have questions about whom to direct a complaint to, it is reasonable to expect them to first approach any of those who are supervising their work to ask for clarification.

For example, in *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 931-32 (D.S.C. 1997), a former employee of Grimes Aerospace returned to work at the company through a temporary staffing agency. The woman believed that she was both an employee of the company and of the temporary staffing agency and orally complained to the company when she did not receive proper overtime pay. Upon receiving this complaint, the company told her that the staffing agency only was responsible for paying her wages. *Id.* at 932. Oral inquiries like this one – where employees are seeking to clarify which entity is responsible for compliance with wage and hour requirements – are necessary as individuals seek to protect their rights under wage and hour laws. However, such inquiries would be unprotected from employer reprisal under the Seventh Circuit's decision.

B. Requiring Written Complaints Would be Largely Impossible for Workers Who Are Functionally Illiterate.

A written complaint requirement would pose a significant challenge for workers who are functionally illiterate – a surprisingly large share of the U.S. workforce. For these workers, a requirement that they write out their objections, when they are unable to do so, will leave them unprotected from retaliatory conduct.

Adult illiteracy impacts a significant number of workers. A study by the Department of Education found that 14 percent of people 16 and older had "below basic prose" literacy skills.[29] In four of the five boroughs of New York City, at least a quarter of adults are functionally illiterate, meaning that they are unable to perform tasks such as filling out a form or reading medical instructions.[30] Literacy problems are especially acute among low-wage workers. Results from the National Adult Literacy Survey found that just over 40 percent of the labor force scored at the two lowest levels of literacy proficiency, and that, on average, less literate workers were concentrated in low-wage industries like service, laborer, helper, cleaner, agriculture, forestry, and fishing.[31]

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[29] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *A First Look at the Literacy of America's Adults in the 21st Century* 4-5 (December 15, 2005), *available at* http://nces.ed.gov/NAAL/PDF/2006470.PDF (finding that "below basic prose" literacy skills defined as ranging from being completely nonliterate in English to being able to locate easily identifiable information in short, commonplace, prose texts).

[30] David Jason Fischer & Jeremy Reiss, Ctr. for an Urban Future and Community Serv. Soc'y, *Closing the Skills Gap: A Blueprint for Preparing New York City's Workforce to Meet the Evolving Needs of Employers* 5 (January 2010), *available at* http://www.nycfuture.org/images_pdfs/pdfs/SkillsGap.pdf. Moreover, these adults may work in a variety of occupations. For example, a New York Times piece profiled a high school graduate who was functionally illiterate, yet had held jobs ranging from hospital candy striper, to payroll office employee, to day care worker. Leslie Kaufman, *Can't Read, Can't Write, Can Hide It*, N.Y. Times, October 31, 2004, Section 10.

[31] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Literacy in the Labor Force: Results from the National Adult Literacy*

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Workers who are functionally illiterate will be much less able to protest in writing – and may face the additional fear of alerting their employers that they are unable to read and write.[32] Immigrant workers in particular may also be precluded from filing a written complaint if their English writing skills are not adequate for the task.[33] Excluding oral complaints from retaliation protection would thus be completely impractical and unrealistic for the large number of workers with limited literacy or language barriers.

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Survey xvi, 83 (September 1999), *available at* http://nces.ed.gov/pubs99/1999470.pdf.

[32] *See, e.g.,* Leslie Kaufman, *supra* note 29 (profiling a worker who explained that "I don't honestly know what [the employer would] do . . . but for me it is a dark secret and embarrassing. I am not comfortable with it and I will keep it confidential until I am").

[33] *See,* Urban Inst., *Immigrant Families and Workers: Facts and Perspectives* 3 (November 2003), *available at* http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf (46 percent of foreign-born workers are "Limited English Proficient").

CONCLUSION

This Court should reverse the Seventh Circuit's ruling and recognize that the FLSA's protection against retaliation includes employees who orally complain to a supervisor or employer about potential violations of their rights under the Act.

Respectfully submitted,

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